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Before the
COPYRIGHT ARBITRATION ROYALTY PANEL
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Washington, D.C.

In the Matter of	
DISTRIBUTION OF 1998 AND 1999 CABLE ROYALTY FUNDS	Docket No. 2001-8 CARP CD 98-99

THE MUSIC CLAIMANTS' PROPOSED FINDINGS OF FACTS AND CONCLUSIONS

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PROPOSED FINDINGS OF FACT
AND CONCLUSIONS OF LAW OF MUSIC CLAIMANTS

I. INTRODUCTION

1. The American Society of Composers, Authors and Publishers ("ASCAP"), Broadcast Music, Inc. ("BMI"), and SESAC, Inc. ("SESAC") (collectively, the "Music Claimants"), in accordance with the July 18, 2003 Order of the Copyright Arbitration Royalty Panel (the "Panel") and 37 C.F.R. § 251.52, hereby submit their proposed findings of fact and conclusions of law in the above-captioned proceeding.

2. The evidence presented and the applicable law and precedents support an award to the Music Claimants of 5.0% of the Basic, 3.75% and Syndex funds in both 1998 and 1999.

A. The Cable Compulsory License

3. The Copyright Act provides various exclusive rights to owners of copyrighted works. These exclusive rights, enumerated in 17 U.S.C. § 106, are cumulative, broad and may overlap in certain circumstances. H.R. Rep. No. 94-1476, at 61-65 (1976), reprinted in 1976 U.S.C.C.A.N. 5659, 5674-78. The rationale for the copyright law has been clearly enunciated by the U.S. Supreme Court: "By establishing a marketable right to the use of one's expression,

copyright supplies the economic incentive to create and disseminate ideas." Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 558 (1985); see also Eldred v. Ashcroft, 123 S.Ct. 769 (2003); Mazer v. Stein, 347 U.S. 201, 209 (1954).

4. In 1976, Congress passed the Copyright Revision Act (the "1976 Act") which, among other important provisions, created a compulsory license for the secondary transmission of broadcast signals by cable television systems. Pub. L. No. 94-553 § 111, 90 Stat. 2541 (1976). By permitting cable television operators to secondarily transmit the primary transmissions of broadcast stations, without first obtaining permission from each of the affected copyright owners, Section 111 acts as a "limitation" on the exclusive rights of copyright owners. 17 U.S.C. § 111 ("Limitations on Exclusive Rights: Secondary Transmissions").

5. Section 111 requires cable operators to submit semiannual royalty payments, coupled with statements of account, to the Copyright Office (the "Office") for future distribution to copyright owners of the broadcast programming (including music contained therein) retransmitted by those cable operators. See, e.g., Distribution of 1990, 1991 and 1992 Cable Royalties, 61 Fed. Reg. 55653 (Aug. 3, 1995) ("1990-1992 Decision"). Further, the cable system operator may not, except in compliance with certain rules or the Federal Communications Commission (the "FCC"), willfully alter, by changes, deletions or additions, either the program or any commercial advertisements or station announcements during, before or after the programs. 17 U.S.C. § 111(c). Pursuant to the cable compulsory license, copyright owners are entitled to be paid prescribed royalties for the secondary transmission of their works. See, e.g., Christian Broad. Network, Inc. v. Copyright Royalty Tribunal, 720 F.2d 1295 (D.C. Cir. 1983).

6. Under the 1976 Act, the Librarian of Congress (the "Librarian") is required to distribute annually compulsory license fees paid by cable systems for the privilege of

retransmitting distant television and radio signals containing copyrighted works. 17 U.S.C. §111(d)(4). The fees are to be distributed to copyright owners whose works are included in distant non-network television and radio programming carried by cable systems. 17 U.S.C. §111(d)(3).

7. The "cable royalty fund" is not unitary, but rather is comprised of three separate royalty pools based on the royalty rates paid by cable operators. This first contains the basic compulsory license fees (the "Basic" fund); the second is composed of fees paid by cable systems for the privilege of carrying additional distant signals whose carriage was formerly prohibited by the FCC's distant signal carriage rules (the "3.75" fund); and the third is made of fees paid by cable systems for the privilege of carrying programs that might have been deleted under the FCC's syndicated program exclusivity rules before those rules were repealed (the "Syndex" fund).

8. Between January 1, 1978 (the effective date of the 1976 Act) and December of 1993, proceedings were conducted by an entity, the Copyright Royalty Tribunal ("CRT") authorized by Congress to conduct distribution proceedings. In 1993, Congress abolished the CRT and transferred distribution authority to ad hoc copyright arbitration royalty panels ("CARPs"), the Office and the Librarian. Copyright Royalty Tribunal Reform Act of 1993, Pub. L. No. 103-198, 107 Stat. 2304.

9. Since then, distribution proceedings have been conducted by CARPs, like this one, convened by the Librarian to determine the proper division of royalties among the participating claims in either a Phase I (among claimants to the entire royalty pool) or Phase II proceeding (among claimants to category shares).

10. The plain language of the Copyright Act promotes the settlement of claims to royalties under Section 111, by encouraging claimants to "agree among themselves as to the proportionate division of compulsory licensing fees among them" and permits claimants to "lump their claims together and file them jointly." 17 U.S.C. § 111(d)(4).

B. The Background of This Proceeding

1. Procedural History

11. Pursuant to its statutory mandate, on November 20, 2001, the Office announced the schedule for a Phase I CARP proceeding to distribute 1998 cable royalty fees, and simultaneously requested comments on whether to consolidate the 1998 proceeding with a Phase I proceeding for distribution of 1999 cable royalties.[1] 66 Fed. Reg. 58179. On February 20, 2002, the Office issued an order consolidating the 1998 and 1999 distributions into a single proceeding, and setting a schedule under which direct cases were to be filed.

12. On June 3, 2002, all of the Phase I parties submitted a stipulation of settlement regarding the claims of National Public Radio ("NPR"). Pursuant to the stipulation, NPR is to receive 0.18% of the total funds available for the 1998 and 1999 distributions.

13. On November 15, 2002, all of the remaining Phase I parties submitted a stipulation of settlement regarding the claims of the Devotional Claimants (the "Devotionals"). Pursuant to the stipulation, the Devotionals are to receive (after deducting the NPR settlement amount) 1.19375% of the available Basic Funds and 0.907025% of the available 3.75% Funds for each of 1998 and 1999. Devotionals receive none of the Syndex funds for 1998 and 1999.

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[1] Phase II would deal with the division of these shares among individual claimants within each group; all Music Claimants have reached a voluntary agreement, therefore no Phase II proceeding for Music will be required.

14. On December 2, 2003, written direct cases were filed by 1) the Music Claimants; 2) the Program Suppliers; 3) the Joint Sports Claimants ("JSC"); 4) the Public Television Claimants ("PTV"); 5) certain commercial television and radio broadcasters (represented by the National Association of Broadcasters ("NAB")); and 6) the Canadian Claimants. Each of the claimant groups requested percentage awards from the Basic Fund. Each of the claimant groups, except PTV, requested awards from the 3.75% Fund. Only the Program Suppliers, who claimed 95.5%, and Music Claimants, who sought 5.1% (since adjusted to 5.0%), requested awards from the Syndex Fund.

15. On April 11, 2003, the Office issued an Order announcing the initiation and schedule for the arbitration hearing.

16. The Panel conducted hearings relating to the parties' direct cases between April 24 and June 11, 2003.

17. Written rebuttal cases were filed by all parties on June 20, 2003. The Panel conducted hearings relating to the parties' rebuttal cases between July 8 and July 18, 2003.

2. Music Claimants' 1990-92 Settlements

18. On January 16, 2003, after the filing of written direct cases, certain claimants filed a motion with the Office for a declaratory ruling concerning the use in this proceeding of Music Claimants' 4.5% settlement award in the 1990, 1991, and 1992 Cable Royalty Distribution Proceedings (the "1990-92 Proceeding"). The motion requested the Office to limit the scope of the Panel's consideration of the settlement agreement in determining whether there have been changed circumstances that justify a departure from the 4.5% share.

19. The Music Claimants and the other claimants in the 1990-92 Proceeding executed a "Stipulation of Settlement of Claim of the Music Claimants to the 1991 and 1992 Cable

Royalty Funds" (the "1991-92 Stipulation") on June 27, 1995.[2] The 1991-92 Stipulation provided that the Music Claimants would receive "an amount equal to 4.5% of each of the Basic, 3.75 and Syndicated Exclusivity Funds for 1991 and 1992 remaining after distributions made to National Public Radio."

20. The 1991-92 Stipulation also contained the following language:

> The terms set forth in this stipulation represent a compromise and settlement and apply to the 1991 and 1992 Cable Royalty Distribution Proceedings only; no party shall be deemed to have accepted as precedent any principle underlying, or which may be asserted to underlie, this stipulation.

21. The 1990-92 Proceeding ultimately resolved the distribution of approximately $540 million. The settlements described above resulted in distributions to the Music Claimants of well over $20 million.

22. Although the other claimants in the 1990-92 Proceeding settled with the Music Claimants, they continued to litigate the distribution of the 1990-92 funds among themselves resulting in a full hearing, an appeal to the Librarian, and ultimately an appeal to the U.S. Court of Appeals for the District of Columbia Circuit.

23. On March 20, 2003, the Office, *inter alia*, denied the motion concerning the Music Claimants' settlement. The Office determined that the Panel was the proper body to consider the use, admissibility and weight of the Music Claimants' settlement agreement. See Order at 24.[3]

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[2] At the time the 1991-92 Stipulation was entered into, the Music Claimants and the other claimants had already executed a settlement with respect to the 1990 cable royalty funds under which the Music Claimants received 4.5% of each of the 1990 funds.

[3] Testimony concerning Music Claimants' 4.5% settlement of the 1990-92 fund was subsequently accepted by the Panel without objection. See, generally, Boyle D.T. at 9; Boyle Tr. 4411:7-4412:18.

C. The Panel's Task and Scope of Review

24. The Panel's task in this proceeding is to establish the shares of the six Phase I claimant groups in this proceeding, taking into account the stipulated shares to be awarded to the settled claimant groups.[4]

25. To determine the appropriate shares to be awarded to each claimant group, the Panel "shall act on the basis of . . . prior decisions of the Copyright Royalty Tribunal, prior copyright arbitration panel determinations, and rulings by the Librarian of Congress under Section 801(c)." 17 U.S.C. § 802(c). Furthermore, the rules governing this proceeding require that: "the transcript of testimony and all exhibits, papers, and requests filed in the proceeding, shall constitute the official written record." 37 C.F.R. § 251.49(b). Thus, in making its determination, the Panel may rely only on evidence admitted into the record. See 37 C.F.R. §§ 251.51, 251.53.

26. The share of the royalty pool that each claimant group should receive is based on an estimate of how much of the total royalty pool each claimant group would receive in a hypothetical unregulated market (an "open" market). 1983 Cable Royalty Distribution Proceeding, 51 Fed. Reg. 12,792, 12,793 (Apr. 15, 1986) (Docket No. CRT 84-1 83CD) ("1983 Decision"); Distribution of 1990, 1991 and 1992 Cable Royalties, Panel Report at 22-25 (June 3, 1996) ("1990-92 Decision").

27. As the claimant groups in this proceeding have been awarded shares in years past, the Panel may employ two methodologies to determine whether an awarded distribution share

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[4] As set forth above, NPR's award of .18% was taken out of the total 1998-99 cable royalty funds, while Devotionals share is based on the remaining amount after the NPR settlement. By agreement of the parties, all percentages requested by the remaining claimants are based on division of the remaining funds after the NPR settlement.

should differ from a prior year's award: first, changed circumstances; and, second, new evidence. See, e.g., Nat'l Ass'n of Broads. v. Copyright Royalty Tribunal, 772 F.2d 922, 932 (D.C. Cir. 1985).

28. Accordingly, it is appropriate for the Panel to determine whether circumstances have changed, insofar as any such conclusion will have a clear impact on whether an award should change from the preceding year (or years).

II. SUMMARY OF ARGUMENT

29. Music is a program element, not a program type. Because music runs throughout all programming, it differs from the other program types in this proceeding.

30. The Panel's task in this proceeding is to establish the shares of the six claimant groups, including five program types and Music as a program element. In so doing, the Panel must act on the basis of precedents, the law and record evidence.

31. In the 1983 Proceeding, the most recent proceeding in which a share of these funds for Music Claimants was determined, a "changed circumstances" approach was used to determine Music's open-market value. The share previously awarded to Music Claimants was adjusted upward based upon a finding of increased music use.

32. The 1991-1992 settlement, which provided an allocation to Music of 4.5% of each of the three funds for 1991-92, is a reasonable reflection of the parties' assessment of the value of music in 1991-92. It is also probative evidence of the other parties' perception that there had been no significant decline in music use or other changed circumstances between 1983 and 1991-92.

33. It is, therefore, reasonable to calculate Music Claimants' share by adjusting the 4.5% that Music was awarded in 1983, and that Music received as a settlement for each of 1984 through 1992, to account for any changes in music use between 1991-92 and 1998-99.

34. Music Claimants have demonstrated that music use has increased by some 11% between 1991-92 and 1998-99 and, therefore, that the Music Claimants are entitled to an increased allocation from the 4.5% benchmark to 5.0% of each of the funds.

35. In an open market, Music Claimants' share would also be determined by a benchmark and changed circumstances analysis. Rate courts have significant impact upon open-market negotiations and rate courts apply the benchmark and changed circumstances approach to evaluating music.

36. In rate court proceedings, the fee for music use in distant signal programming would be likely based on the prior litigated rate from 1983 (4.5%) , and the negotiated settlement rate achieved for the years 1984 through 1992, as adjusted for changes in music use. Because it is very likely that a rate court would use the 4.5% rate adjusted to account for an increase in music use, the parties negotiating a license in an open market would also be likely to use it in an open market.

37. The Music Claimants presented strong evidence of the qualitative value of music on distant signal programming in 1998-99. There is no record evidence that there was a decline in quality, entertainment value, overall music use, feature music use, or any other aspect of music, that would negate or countervail the demonstrated increase in music use from 1991-92 to 1998-99.

38. Because music runs through all programming, it is very difficult to quantify its value. The CRT and rate courts have concluded that the determination of the open market value of a blanket music license is a very difficult task.

39. The only new evidence the other parties have introduced concerning Music Claimants' share, the testimony of Dr. Schink, should be disregarded as based on an oversimplified approach, one rooted in false analogies, and in disregard for twenty years of CRT/CARP precedents and rate court decisions. Dr. Schink based his calculation of Music's share on data that was distorted by the inclusion of the non-compensable programming of the broadcast television Networks – ABC, CBS, and NBC. This Network programming has always been excluded from any data used to calculate Music Claimants' share or, for that matter, the shares of the other claimants. The inclusion of network programming – as well as other serious mistakes – requires that Dr. Schink's analysis be rejected as a basis for determining Music's share.

III. PROPOSED FINDINGS OF FACT REGARDING MUSIC CLAIMANTS

A. In an Open Market, Music Claimants Would Negotiate Blanket Licenses for All Music Performed in Distantly Retransmitted Programming

1. The Performing Rights Organizations

40. The Music Claimants are comprised of the three U.S. performing rights organizations, ASCAP, BMI and SESAC, which together represent more than 450,000 composer, songwriter and publisher members and affiliates. Saltzman D.T. at 6; Saltzman Tr.

3911:20 - 3912:2.[5] They are also affiliated with over 60 foreign performing rights societies around the world, and license performances in the United States of the musical compositions of hundred of thousands of foreign writers and publishers. Saltzman D.T. at 6; Saltzman Tr. 3911:1-19. Collectively, the Music Claimants are responsible for licensing the public performances of millions of copyrighted musical works. Saltzman D.T. at 6; Saltzman Tr. 3912:3-5 Thus, Music Claimants represent virtually every songwriter and music publisher entitled to royalties under Section 111. Accordingly, the Music Claimants in this Phase I proceeding seek compensation for all music performed in programming carried by distant signals, regardless of whether the local station performance was directly licensed by the composer or licensed through a performing rights organization. Boyle Tr. 4410:17-4411:1.

41. ASCAP, BMI and SESAC represent award-winning songwriters in all genres of music, from Bruce Springsteen and Ella Fitzgerald to Willie Nelson and Shania Twain to Bob Dylan and Neil Diamond. See Saltzman D.T., App. A. But the vast majority of songwriters and composers represented by the Music Claimants are not famous, do not win awards and earn very modest amounts of royalties for the use of their musical works. Saltzman D.T. at 7. The typical songwriter is not a recording artist or performer, and does not receive income from making records of his or her songs, instead receiving a modest income from his or her creative efforts at writing music that is publicly performed by others. Id. These songwriters' livelihoods can depend to a large degree on the royalties distributed by their respective performing rights organization. Id.

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[5] Citations to written direct testimony are denoted by "D.T." followed by the page number, and citations to rebuttal testimony and denoted by "R.T." Citations made to oral testimony identify the name of the witness followed by "Tr." and reference the relevant portion of the transcript.

42. Performing rights organizations serve as clearinghouses for their writer and publisher members and affiliates and the users of copyrighted music in their repertories. Saltzman D.T. at 3. Music Claimants license their music repertories, primarily on a bulk license basis, to businesses that use music in a wide variety of industries. Id. at 4. For decades, Music Claimants have licensed radio stations, television networks, independent and network television stations, cable television programming services, restaurants and nightclubs, concert halls, arenas and theme parks, to name a few. Saltzman D.T. at 7.

43. Performing rights organizations make more efficient licensing of music possible. Given the vast number of users and performances, it would be extremely time-consuming and costly for Music Claimants' members and affiliates to locate and license performances of their works across the entire spectrum of music users by themselves. Saltzman D.T. at 3. Similarly, the ability of users of copyrighted music to obtain music performing rights is greatly enhanced by Music Claimants. Id. at 3. Without Music Claimants, users would have to identify the owners of the music they wish to perform and negotiate licenses with each one of them in advance of the uses. Id.

2. The Blanket License

44. Music Claimants facilitate the myriad uses of music by licensing in bulk. Music users obtain from the individual performing rights organizations – ASCAP, BMI and SESAC – the right to perform publicly all of the millions of copyrighted musical compositions in their repertories, and the repertories of their foreign affiliates, through a single license with each organization. Saltzman D.T. at 4. For an annual fee, users are granted a license to perform as

much or as little music in the Music Claimants' repertories as they wish within the license period. Id. This is commonly referred to as a "blanket" license.[6] Id.; Boyle R.T. at 5.

45. The blanket license provides the music user with benefits beyond the aggregated value of each individual use of music. Courts have recognized that the blanket license has its own separate value, offering among other things, (1) an ability to use as much or as little music as the user wishes; (2) an ability to greatly limit transactional licensing costs; and (3) indemnification for infringements. See Music Claimants' Ex. 6, United States v. Am. Soc'y of Composers, Authors & Publishers (Application of Capital Cities/ABC, Inc.), 831 F.Supp. 137, 144, 156 (S.D.N.Y. 1993) ("Capital Cities/ABC, Inc.") (court "remains incapable of quantifying the value of music to any particular television program"); Am. Soc'y of Composers, Authors & Publishers v. Showtime/The Movie Channel, Inc., 912 F.2d 563, 591-592; United States v. Am. Soc'y of Composers, Authors & Publishers (Application of Buffalo Broad. Co., Inc.), Civ. No. 13-95 (WCC), 1993 WL 60687 (S.D.N.Y. Mar. 1, 1993) ("Buffalo Broadcasting") (JSC Demo 19); Boyle Tr. 4743.

46. A blanket license issued to a local television station or cable operator permits the use of music not only in all of the television programs, but also in all commercial advertisements and station announcements and identifications. Boyle Tr. 4461:10-4463:20; 5020:10-5021:9.

[6] ASCAP and BMI, but not SESAC, also offer a per program form of blanket license under which a fee is based on revenue generated by the programs of the station that use ASCAP (or BMI) music. Boyle Tr. 4487:3-22.

47. One single annual fee or rate is set for the entire blanket license. Boyle R.T. at 6. This annual fee is negotiated and may be in the form of 1) a flat dollar amount per year; 2) a percentage of the music user's revenues, or 3) a specific dollar amount per subscriber. Boyle Tr. 4486:20-22; 4533:18-20; 454911-16.

3. The ASCAP and BMI Rate Courts

48. ASCAP and BMI are regulated by consent decrees entered to settle antitrust claims asserted by the government many years ago. United States v. Am. Soc'y of Composers, Authors and Publishers, No. 41-1395 (WCC), 2001 WL 1589999 (S.D.N.Y. June 11, 2001); United States v. Broad. Music, Inc., 1966 Trade Cases (CCH) ¶ 71,941 (S.D.N.Y. 1966), modified by, 1996-1 Trade Cases (CCH) ¶ 71,378 (S.D.N.Y. 1994). Under the terms of the consent decrees, BMI and ASCAP are required to provide music performance licenses to any entity that requests a license.

49. If ASCAP cannot reach agreement with a music user on the rate or fee for a performance license, a reasonable rate is determined by a federal judge sitting in the United States District Court for the Southern District of New York (the "ASCAP Rate Court"). Boyle Tr. 4420, 4434. BMI similarly has its own rate court in the Southern District of New York (the "BMI Rate Court"). Boyle Tr. 4437:15-17.

50. When a rate court proceeding is pending, music users pay ASCAP or BMI interim fees that are subject to a "true-up" once a final rate has been determined. Boyle Tr. 4433:8-4434:3

51. For example, the music license fees paid by the local television stations to ASCAP have been based on "interim" rates since April 1998, and will likely be adjusted once a final determination of rates is made. Boyle Tr. 4525:16-21.

52. Similarly, between thirty and sixty cable networks are still paying interim license rates to ASCAP that were established on a temporary basis in 1989. Boyle Tr. 4430:17-20; 4433:3-7.

53. Over a series of decisions, the ASCAP Rate Court has established that a reasonable rate for a music performance license is determined based on consideration of the following factors: the overall amount of music used by the user, the revenues of the music user, rates previously paid by that user or similar users for the purchase of comparable rights, and changes in revenues, music use or other pertinent circumstances since the last litigated or settled rate. See, e.g., Capital Cities/ABC, Inc., 831 F. Supp. 137, 145-46, 156, 162 (describing previous cases). Against this backdrop, music license negotiations generally focus on music use, the revenue of the user and changed circumstances from a previous negotiated rate with the same user group. Boyle Tr. 4418:20-4420:12; 4438:20-4439:13.

54. In market negotiations and rate proceedings between music users and the performing rights organizations, music license fees have never been determined by examining or applying a percentage of program expenses of any user. Schink Tr. 8480:16-21; 8533:16-21; 8534:4-8; Boyle Tr. 4418:20-4420:12; see, e.g., Capital Cities/ABC, Inc., 831 F. Supp. 137.

B. In An Open Market, Music Claimants Would Individually Negotiate with Cable Operators Based on A 4.5% Benchmark Rate.

1. Music Claimants Have Previously Licensed Cable System Operators.

55. Although any entity can request a music license, in a hypothetical negotiation for use of the music currently subject to the compulsory license, each of the Music Claimants would

likely negotiate with the cable system operators (as represented by their trade association, the National Cable Television Association ("NCTA")).[7] Boyle R.T. at 3, 4 n.2, 5-6.

56. In the absence of the compulsory license, which itself is a form of a blanket license, each performing rights organization's negotiation with NCTA would likely yield a blanket license for each operator to perform all of the music in all of the different types of shows and commercials broadcast on the respective distant signals, recognizing that some programs have a lot of music, others less. Boyle R.T. at 5.

57. The Music Claimants do not negotiate licenses based on the individual programming associated with the various claimant groups in this proceeding and would not negotiate separate rates for different types of programming on different days or different times of day. Boyle R.T. at 6.

58. ASCAP and BMI have previously negotiated blanket licenses with the cable operators through the NCTA. Boyle Rebuttal Test. at 4 n.2; JSC Exs. 2-R, 3-R. In 1998 and 1999, ASCAP and BMI each received 8.3 cents per subscriber (in total over $10 million) per year for the use of ASCAP and BMI music on cable systems' Public, Educational, and Government Access ("PEG") and Leased Access channels, as well as their locally inserted advertisements and promotional announcements. JSC Exs. 2-R at 7, 3-R at 5; Boyle Rebuttal Test. at 4 n.2.

[7] It is also possible that Music Claimants would negotiate with the stations rather than the cable system operators. Boyle Tr. 5019:2-12. However, Music Claimants do not grant separate licenses to the suppliers of individual programs or categories of programming content. Boyle R.T. at 6. Therefore, Music Claimants would not directly negotiate with the other claimant groups for a share of their shares. Boyle R.T. at 5.

59. The music in the wide variety of television series, PTV programs, movies, news and public affairs, and sports programs retransmitted on distant signals would likely have greater value to the cable operators than the music contained in the cable operators' locally originated programming. See, generally, Saltzman D.T. 10-14; Walden D.T. 1-10; Lyons D.T. 3-20 (describing breadth of music carried in distant signal programming).

60. The performing rights organizations would achieve higher rates for distant signal retransmission than the NCTA rates because of the greater entertainment value of the programming on distant signals compared to the programming commonly found on PEG and Leased Access channels. Schink Tr. 8553:21-8555:1.

2. Previous Awards and Settlements under the Cable Compulsory License

61. Music Claimants have a nearly twenty year history of litigated and settled shares under the cable compulsory license. In the first ever Section 111 Phase I proceeding concerning the 1978 fund, the CRT awarded Music Claimants 4.5% of the entire cable fund. 1978 Cable Royalty Distribution Determination, 45 Fed. Reg. 63026, 63042 (Sept. 23, 1980) (Docket No. CRT 79-1) ("1978 Decision"). The CRT utilized data from the FCC as one element in determining Music Claimants' share. Id. at 63040. The CRT utilized a calculation based upon data collected from local television stations. No data from television Networks[8] was included. Id. The CRT examined music license fees paid by local stations as a percentage of the programming expenses of such stations, including a number of categories of expenses in the FCC data as set forth in detail in the CRT's decision. Id.

[8] As used herein, "Networks" refers to the ABC, NBC and CBS networks, but does not include the local ABC, NBC and CBS affiliated stations, which are included within the discussion as "stations" or "network affiliates".

62. In developing an average for all broadcast stations, the CRT approved of weighting network affiliate stations and independent stations separately based upon the distant signal carriage by each group of stations. Id. The CRT did not award Music Claimants exactly the weighted average derived from this calculation, but, bearing in mind other considerations, utilized this calculation as one factor in deciding to award Music Claimants 4.5%.

63. The CRT performed a similar analysis in the 1979 Proceeding. 1979 Cable Royalty Distribution Determination, 47 Fed. Reg. 9879, 9894 (Mar. 8, 1982) ("1979 Decision"). The CRT determined that as a percentage of all program expenses, music license fees were 3.7%, a slight decline from the previous year. Id. As in 1978, Music Claimants' share was not based solely on the ratio of music license fees to program expenses; rather, that ratio was only one piece of evidence considered in determining Music's share. Id. Based on its review of the complete record, the CRT decreased Music's share from 4.5% to 4.25%. Id.; Boyle D.T. at 4.

64. In the 1980 Proceeding, Music presented a variety of evidence from songwriters and composers to show music use and the important contribution music adds to television programming. 1980 Cable Royalty Distribution Determination, 48 Fed. Reg. 9552, 9558 (Mar. 7, 1983) (Docket No. CRT 81-1) ("1980 Decision").

65. While noting that the ratio of music license fees to program expenses had decreased, the CRT recognized that the share of program expenses in 1980 could only be calculated by using interim music fee data. The CRT was persuaded that such a calculation did not provide an appropriate marketplace analogy. Id. Accordingly, the CRT dropped the program expense ratio factor from its determination and, ignoring the evidence of a decreased ratio, concluded that it was appropriate to award Music the same 4.25% it had received in 1979. Id.

66. In the 1983 Proceeding,[9] acknowledging that "as a program element, [Music] admits of almost no possible precise formula to determine its marketplace value", the CRT increased Music Claimants' share to its original award of 4.5%. 1983 Decision, 51 Fed. Reg. at 12,812. The award was made without reference to the stations' programming expenditures, a factor dropped in the 1980 CRT determination, but rather on a two-fold change of circumstances. First, the CRT acknowledged that a qualitative change in music use had occurred in that music videos were a new form of music-intensive programming. Second, the CRT found that there had also been a quantitative increase in music use, determining that there was "more use of music in general." Id. Moreover, in finding that music is an element that runs throughout all programming, the CRT awarded Music Claimants 4.5% of each of the three separate funds – Basic, Syndex and 3.75% – despite the CRT's determination that the programming eligible for compensation from these three funds is different. Id. That is, Music's share did not fluctuate depending on the claimants eligible to claim from the Basic, 3.75 and Syndex funds.

67. Since the 1983 Proceeding, there has followed an uninterrupted period of settlements in which Music Claimants have agreed with the other Phase I claimants as to the Music Claimants' share, even though there have been further Phase I proceedings involving other Phase I parties since the 1983 Proceeding. Boyle D.T. at 5. For each of the royalty fund years from 1984 through 1988, all Phase I claimant groups settled at their 1983 shares.[10] As a result, Music Claimants received 4.5% of each of the three funds in each year from 1984 to 1988.

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[9] Music Claimants settled their claims in the 1981 and 1982 proceedings for 4.25%.

[10] 1984 Cable Royalty Distribution Proceeding, 52 Fed. Reg. 8408 (Mar. 17, 1987); 1985 Cable Royalty Distribution Proceeding, 53 Fed. Reg. 7132 (Mar. 4, 1988); 1986 Cable Royalty Distribution Proceeding, 54 Fed. Reg. 16,148, 16,149 (Apr. 21, 1989); 1987 Cable Royalty Distribution Proceeding, 55 Fed. Reg. 5647 (Feb. 16, 1990).

In 1989, the other claimants could not settle all their Phase I controversies, and a CRT proceeding ensued. Id. Nevertheless, Music Claimants settled in Phase I, on the proverbial courthouse steps (after filing its direct case and providing underlying documents to the other claimants in discovery) again receiving 4.5% of each of the three funds.[11] See Schink R.T. Apps. B, C; Schink Tr. 8495:6-14.

68. As with the distribution of the 1989 fund, the distribution of the 1990, 1991 and 1992 cable royalty funds was not settled by all the Phase I parties. Upon a restructuring of the compulsory license regime, a consolidated Phase I hearing for distribution of the 1990-1992 funds was heard by a CARP.[12] Again, Music Claimants settled for 4.5% of each of the Basic, 3.75%, and Syndex funds.[13]

69. All Phase I claimant groups settled the 1993 through 1997 royalty fund distributions without need for a proceeding, and the terms of settlement are confidential. Music Claimants settled with Program Suppliers and JSC as part of a group of Phase I claimants that also included NAB, PTV, the Devotionals, the Canadian Claimants and NPR.

3. Music Claimants' 4.5% Share Is the Proper Benchmark to Calculate Changes in Music's Allocation.

70. If the cable compulsory license were not in effect, the cable operators carrying distant signals would have to obtain a license for the musical works that are retransmitted on

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[11] 1989 Cable Royalty Distribution Proceeding, 57 Fed. Reg. 15,286, 15,288 (Apr. 27, 1992).

[12] The 1990-1992 proceeding consolidated two proceedings, one over the 1990 fund and one over the 1991-1992 funds. Music Claimants entered into separate settlement agreements concerning the 1990 year and the 1991-1992 consolidated years and the Librarian determined shares separately for the 1990 and 1991-1992 periods despite their consolidation into one proceeding.

[13] Distribution of 1990, 1991 and 1992 Cable Royalties, 61 Fed. Reg. 55,653, 55,669 (Oct. 28, 1996).

such signals. 17 U.S.C. § 106. In order to receive authorization to publicly perform musical works, the cable operators would negotiate blanket licenses with the individual performing rights organizations (ASCAP, BMI, and SESAC) who comprise the Music Claimants in this case. Boyle R.T. at 3, 5-6; Boyle Tr. 4412:19 - 4414:5, 4669:9-16, 4670:8-17, 5019:8-12.

71. In negotiating such blanket licenses, both the cable operators and the Music Claimants would be aware that if they did not reach an agreement, a reasonable rate would be set by the rate court. See ¶¶ 48-54, supra. Accordingly, the cable operators and the performing rights organizations would tend to negotiate an open marketplace rate consistent with their perception of the level of rates a rate court would establish.

72. ASCAP Rate Court decisions have determined that rates for blanket licenses for particular types of users can generally be based upon prior rates applicable to those particular users or types of users as well as changes in the user's economic conditions (i.e., revenues) and in the amount of music used by such particular users or types of users in the time period between the effective dates of prior rates and the time period to be covered by the new rates. See, e.g., Capital Cities/ABC, Inc., 831 F. Supp. at 144, 161 ("the Court finds it appropriate to consider previous agreements voluntarily entered between the parties, or those similarly situated, as the starting point of its analysis"; "these factors – gross revenue and music use – are critical in assessing the royalties for an ASCAP license"); see also Adjustment of the Rates for Noncommercial Education Broadcasting Compulsory License, 96-6 CARP NCBRA, Panel Report at 28 (looking at changes in revenues and music use) (PTV Demo 5) ("NCBRA Decision"). In the hypothetical unregulated market for distant signals, there would be precedent as to the relative value of music to other program content but not precedent as to the absolute market value of music rights due to the subsidy nature of the compulsory license rates. The

cable operators and the performing rights organizations would negotiate market rates with reference to prior shares awarded to Music applicable to distant signals. These negotiations would include an analysis of cable operator revenues and any change in music use during the time period covered by the negotiated rates and the time period of the last award to Music.

73. Thus, in an open market, the proposed license fee would be based, in significant part, on prior shares received for music licenses in the compulsory license setting, both the litigated rates in 1978-1980, and 1983, and the settlements reached for each of 1984, 1985, 1986, 1987, 1988, 1989, 1990, 1991 and 1992, and then adjusted for changed circumstances. Boyle D.T. at 6.

74. Because Music Claimants' share has remained constant at 4.5% of each fund from 1983 (when the CRT made a market valuation) through 1992, a benchmark share (4.5%) has already been set in place. Boyle D.T. at 6. This benchmark is particularly appropriate because it was adopted by the CRT in an effort to replicate an open market. The number of subsequent publicly-available settlements and the length of time over which the rate has been in effect also make it a likely benchmark. Boyle D.T. at 8.

75. The more recent settlements are also indicative of the other claimant groups' perceived value of Music's share. Music Claimants were the only claimant group (aside from NPR) to settle the 1990-92 case, so few litigation costs were saved by those settling with Music Claimants. Moreover, the combined funds in that proceeding were significant, exceeding $500 million, such that even a small change in a party's share would have been monetarily significant.

76. Therefore, as a reasonable fair market benchmark of 4.5% has been set, this Panel should consider whether changed circumstances require a change in Music's award. Because the revenues (i.e., the amount of compulsory license royalties) distributable in this proceeding are

fixed by statute and because the issue uniquely before the Panel is what proportion of those revenues each claimant should receive, the "change of revenue" issue often present in music license negotiations is not an issue here. Therefore, the relevant changed circumstances inquiry is whether the use of music throughout all programming, cumulatively, has changed since the last determination of Music Claimants' share, either qualitatively or quantitatively, or both. Boyle D.T. at 6.

C. In 1998 and 1999, Music Was an Increasingly Important Element that Ran Through All Programming on Retransmitted Distant Signals

1. In 1998 and 1999, Music Was Qualitatively More Valuable to Television Programming Than in 1983.

77. Music Claimants presented testimony regarding the importance of music in distant signal programming from Jeffrey Lyons, the noted professional movie, theatre and show business critic. Lyons D.T. at 1. In addition to being a professional film critic, having reviewed more 6,000 movies, Mr. Lyons has worked for decades on local station-produced news programs and for twelve years served as the co-host of *Sneak Previews* on PBS. Id. at 1-2. He is also an author of two sports-related books who has utilized his critic's eye as an avid viewer of sports on television. Id. at 2.

78. The Panel also received testimony from the Emmy award winning and pre-eminent television composer Snuffy Walden. Mr. Walden is also a songwriter and a guitarist who, since 1998 has written music for more than 35 television series, including *The West Wing*, *The Drew Carey Show*, *Once and Again*, *Felicity*, *Providence*, *Roseanne*, *My So Called Life*, *thirtysomething* and *The Wonder Years*. Walden D.T. at 1.

79. Mr. Lyons testified to the crucial contribution music makes to movies and television programming. Mr. Lyons described the importance of all uses of music--the theme

song, background and underscore, as well as feature use. Lyons D.T. at 3-21. Mr. Lyons discussed how music is used in these ways to create an overall mood and to cue the viewers' emotions and attention. Lyons D.T. at 4-7. Using examples from films such as *Jaws, Raiders of the Lost Ark* and *M*A*S*H,* Mr. Lyons demonstrated how music is able to identify a character, create ambience and evoke an emotional response. Lyons D.T. at 4-7; Music Exs. 8-11. Without music, Mr. Lyons concluded, filmmakers would have to work much harder to convey the plot, flow and meaning of the screen action, if it could be done at all. Id. at 5-6.

80. Mr. Walden described the process by which music in television shows is written, explaining the importance of music to television, using examples from the background and feature music used in selected episodes of the television program *Felicity.* Walden D.T. at 3-10. Music Exs. 5-7. Mr. Walden testified as to how music – as theme, feature and background – fits within and enhances the structural, thematic and emotional content of a television series. Walden D.T. at 5.

81. Mr. Walden also testified that a composer will often create a particular orchestral palate or distinctive sound (e.g. string, orchestral, garage band) for a television series. Walden D.T. at 3. This gives each show its own distinctive, signature sound that is used to "brand" the program with the audience. Id.; Walden Tr. 4089.

82. While these essential roles that music has played in programming throughout the years have not changed--music will always serve as a crucial element running throughout all programming--in 1998 and 1999 music was a more central and valuable part of programming than it was in 1983. See Lyons Tr. 4179-4181; Walden Tr. 4084.

83. Since 1983 there has been a substantial, qualitative increase in the use of music across of the spectrum of programming on stations carried as distant signals as a means to draw

audience to and to serve as a marketing tool for motion pictures and television series. Lyons D.T. at 7-11. These changes reflect the growing synergy between the television and movie industries and the music industry. Id.

84. This qualitative growth can be traced back to the early 1980s. Lyons D.T. at 9. Since the 1983 Proceeding, when Music Claimants last litigated their share, there has been a significant evolution in the use of music in movies and television programming. The popularity of music, particularly with younger audiences, led to a phenomenon, begun in the early 1980s and exploding throughout the 1990s, where even non-music-oriented movies contain wall-to-wall popular music to draw audiences and promote the film as well as to sell separate audio soundtrack recordings. Id. The origin of this movement was the advent of music videos; filmmakers understood that one way to connect with this new audience was through the use of music in their motion pictures in a similar manner to music videos. Id.

85. The phenomenon of increased movie-music popularity is real and economically significant, as seen by the launching of a cable network called the Soundtrack Channel, featuring music videos of popular movie (and television) music. Music Exs. 13-15 (illustrating, popularity, availability and sales of soundtracks, as well as articles discussing the importance of movie music), 17 (webpages and article regarding the Soundtrack Channel).

86. Of course, this phenomenon has not been limited to movies. Syndicated television series, both dramatic and comedic, also placed an increased importance on the use of music throughout the 1990s. Lyons D.T. at 14-16. Recognizing the important association of the program with the music, television producers demanded that music be used to create a specific style for a show. Walden Tr. 4084-4086. Over time, the use of background music in dramatic television programs has become increasingly sophisticated. Thompson Tr. 8197:7-13.

87. The increased prominence of music has also taken the form of a greater use of feature songs in series, as well as a requirement that each show have its own musical style. Walden Tr. 4085-86; Lyons D.T. at 14-17. Beginning with *Miami Vice* in the mid-80s, prime-time dramas and comedies alike scored a growing number of scenes with pop music from both established acts and undiscovered artists. Lyons D.T. at 14. Television series increasingly embedded music videos into their programs. Walden Tr. 4086. Music Exs. 6, 7 (examples of musical performances of *Bridge Over Troubled Water* and *Here Comes the Flood* in scenes from *Felicity*).

88. Producers understood the value that popular music can have with an audience. Programs began to score practically every scene with pop music from established acts and undiscovered artists. Lyons D.T. at 15. Programs such as *Dawson's Creek, Beverly Hills 90210, Ally McBeal* became synonymous with popular music. Id.

89. The synergy between the television and music industries grew during the 1990s. Musicians would market their music through the show and would often guest star. Lyons D.T. at 15. Programs would literally market the music of featured artists performed during the show prior to the closing credits. Lyons D.T at 16.

90. One measure of the increased importance of music in television and movies is the growth in the past decade of the number and popularity of television and movie soundtracks. Saltzman D.T. at 15-16; Music Ex. 2. The increase of soundtrack album sales is a logical outgrowth of the convergence of the music, movie, and television industries. Saltzman D.T. at 15.

91. *Billboard* magazine maintains a weekly chart that tracks the top-200 selling albums. Saltzman D.T. at 15. Music Claimants calculated the average number of soundtrack

albums within the weekly top-200 for each year between 1990 and 1999. Saltzman D.T. at 15. The average weekly number of soundtracks in the top-200 increased from 7.25 in 1990 to 11.29 in 1992 and continued to steadily increase, reaching an average of 18.15 in 1999. Saltzman D.T. at 15-16; Music Ex. 2.

92. The increased reliance on music as an effective tool to attract and keep an audience spanned virtually all program categories. For example, public television stations not only began to fill their schedules with music performance programming, but also highlighted the music in their programming. Lyons D.T. at 17-18; Music Claimants' Ex. 26 (PBS' marketing of soundtracks associated with programming); Music Exs. 24 (PBS webpages demonstrating the role of music in child development), 25 (webpages demonstrating music use in PBS children's shows), 26 (webpage printouts advertising soundtracks from various PBS programs).

93. Similarly, the producers of sporting events and programs likewise recognized the increasing value that music provides. Lyons D.T. at 18-20; Lyons Tr. 4169-4172. Elaborate sound systems provide pop music throughout sports events to create an entertainment experience for the fan. Lyons D.T. at 18-19. Teams and individual players now march out to individualized theme songs, which the fans can later buy on special sports soundtracks. Lyons D.T. at 20; Music Claimants' Exs. 28, 29. Finally, station-produced television programming has followed this trend. Lyons D.T. at 20-21. Not only are morning shows that include live music performances, popular culture and personal interest pieces more evident, but newscasts now use popular music during their broadcasts as a way to create an identity and win viewers. Lyons D.T. at 20-21. (weather, sports and traffic segments adding popular music).

2. Music Is A Featured Element in All Program Types

94. Music is unique in these proceedings. It is a program element rather than a program type. Unlike all other copyrighted works – sports programming, movies, syndicated programs, public broadcasting, station-produced programming, Canadian and devotional programming – music, as a program element, adds value to all programming. Boyle D.T. at 2. Indeed, it is well-enough established as to be axiomatic in these proceedings that "music runs throughout all programming". 1983 Decision, 51 Fed. Reg. at 12,812.

95. Music use in all forms of programming carried in distant signals is widespread. Whether as a theme, background or feature use, music is ubiquitous throughout all programming. Saltzman D.T. at 2, 10-15; Saltzman Tr. 3927-3930 (various program groups); Walden D.T. at 1-10; Walden Tr. 4078-4093 (syndicated series and film); Lyons D.T. at 2-22 (movies, syndicated series, station-produced programming and public television programming; Music Claimants' Exs. 1 (videotape of music retransmitted on local stations (1998-1999)), 5-7 (videotape of excerpts from *Felicity*), 8-12 (videotape of excerpts from various films), 16 (videotape montage of popular music in films), 20 (videotape of *Dawson's Creek* promotion of featured artists' CDs).

96. The record is replete with examples of each of the other claimant groups using copyrighted music to enhance the value of their programming:

a. Program Suppliers

97. Jack Valenti of the Motion Picture Association of America acknowledged that music is an important element in movies and syndicated programming. Mr. Valenti also stated that the industry spends "significant sums on working music into movies and syndicated programming" and that music soundtracks of movies and syndicated shows are "marketed

aggressively as part of the whole entertainment experience." Valenti Tr. 6245:21-6246:1, 6246:2-5, 6247:8-11.

98. As discussed supra, ¶ 91, the growing connection between television and movies and music was illustrated by a study of the number of television program and movie soundtracks appearing in the Billboard magazine Top 200 from 1990 through 1999. Saltzman D.T. at 15-16; Music Claimants' Ex. 2.

99. Various Program Supplier witnesses testified as to the use of music in series programming. See, e.g., Winkelman Tr. 6336:5-16 (when used appropriately, music can enhance value); Kessler Tr. 6600:4-7 (music is used in all types of programming). Indeed, Professor Robert Thompson acknowledged that television series theme songs imprint themselves on the popular culture. Thompson Tr. 8191:15-8194:16.

b. Joint Sports Claimants

100. Producers of JSC programs recognized that even when the game is the principal draw, the use of music keeps their audience. NFL Commissioner Paul Tagliabue testified about the use of music in NFL broadcasts, recognizing that the broadcasts have some musical elements in their telecasts of their NFL programming. Tagliabue Tr. 197:14-21. At no place is this more evident than at the Super Bowl, the most watched television event of the year. The Super Bowl Halftime Show is filled with high profile music talent, specifically in order to hold the audience when the game is not being played. Tagliabue Tr. 193:21-194:1, 194:16-18.

101. Moreover, music has become ubiquitous at sporting events and the music from the venue carries on to the television broadcast. Tagliabue Tr. 197:3-12. Jeffrey Lyons testified about examples of the rock anthems used to exhort fans at baseball games and the energetic songs performed throughout hockey and basketball games to excite the fans and the players.

Lyons D.T. at 18-19; Music Claimants' Ex. 1 (Saltzman videotape including excerpts of music used at baseball and basketball games).

c. Public Television

102. Public television is a significant user of music. The Public Television Claimants utilized music-intensive programming as a primary basis for demonstrating the value of its programming in this proceeding. In comparing PTV to so-called "copycat" cable networks, John Wilson, PBS's Senior Vice President of Programming, recognized that while there was very little performance programming on the specialty channels, "Public Television still maintained a rich line of everything from Broadway presentations to classical music to pop music, rock music." Wilson Tr. 3036:10-3037:5. PTV's live performances are predominantly musical and include "everything from Live From Lincoln Center to the Metropolitan Opera top performances of regional music that is produced from other places from around the country." Wilson Tr. 3038:5-16. Moreover, Mr. Wilson acknowledged that performance programs, which are comprised entirely of, or at least feature, music, are an example of these unique programs that attract viewers to PBS. Wilson Tr. 3223:1-13.

103. Indeed, PTV Ex. 7, a program schedule from Washington, DC-area public television stations, is replete with prime-time music programming.

104. A clear indication of the value of music to PTV is the prominence of music during Pledge Week, when PTV solicits contributions from its viewers. Mr. Wilson testified that public television often uses music or performance programming in connection with its pledge drives, and that public television uses music to promote its programming and to raise funds. Wilson Tr. 3224:3-11. See also Saltzman D.T. at 12 (identifying "Rolling Stones Bridges to Babylon",

"Sarah Brightman One Night in Eden" and "Doo Wop 50" as examples of concerts airing on public television during pledge periods in 1998 and 1999).

105. Similarly, PTV Exhibit 6, which is a showcase to the Panel of the quality of PTV programming, is fully set to music and contains several examples from PTV performance and particularly children's programs. Mr. Wilson acknowledged that the children's programming aired on PBS has a great deal of music and feature singing and dancing as a frequent part of program activities. Wilson Tr. 3219:21-3220:9; 3220:22-3221:3.

d. NAB

106. Commercial television frequently uses music to brand its programs. Marcellus Alexander, a former General Manger of two local television stations testified, in reference to specific theme music, that music is used to open news programs and that the music in those programs help to identify the program to the audience. Alexander Tr. 2268:3-19. Themes act as lead-outs, lead-ins and cues; their purpose is to draw, welcome and lead the viewer. Lyons D.T. at 20. For local stations, keeping the viewer tuned to the news is important and it is the mission of the theme to keep those viewers and take them to the news. When there is a late-breaking story, it is the news theme music that signals the viewer to the important story. Lyons D.T. at 20-21.

107. Beyond the branding and cueing functions, newscasts are making uses of music as a way to entertain and retain viewers. For example, weather and traffic segments are accompanied by popular music. Lyons D.T at 20-21; Saltzman Tr. 3927; Music Claimants' Ex. 1. In fact, morning news programs increasingly include more popular culture and personal interest pieces that rely music to keep viewers. Lyons D.T. at 21.

108. While much of NAB's programming consists of local newscasts, the commercial television claim also includes more music-intensive programming, such as children's programs, magazine shows, specials and documentaries. Ducey D.T. at 3. As with PTV, when NAB presented a videotape to represent its programming, it selected excerpts that were filled with music. From the background music used to convey the historical era of the Gold Rush to the friendly theme of morning show Pepper & Friends to the ominous tones underlying a news story about a man improperly convicted of a capital crime, commercial television programming uses music in a manner similar to the other claimant groups. NAB Ex. 8; see also Rosston Tr. 2613:9-12 (music is part of all programming types).

e. Canadian Claimants

109. Canadian programming is no different in its reliance on music as a valuable and integral program element. Bennett Tr. 5493:6-10 (there is "no reason to believe that there's less music or the music in Canadian programming is of a lower quality than the music in U.S. programming"). Canadian Claimant witnesses Andrea Wood, Janice De Freitas and Lucy Medeiros testified as to the use of music in Canadian-produced programming, particularly children's programming and as important program identifier. Wood Tr. 5116:11-17, 5117:10 - 5118:4, 5202:13-15, 5259:1-3; De Freitas Tr. 5200:2-6; Medeiros Tr. 5246:10-16. Dr. Deborah Ringold accurately described music on Canadian programming as "ubiquitous." Ringold Tr. 5942:4-10. See also Canadian Claimants Exs. CDN-1-L, CDN-2-A (videotapes of programming which contain music).

f. Radio

110. In prior proceedings, the Music Claimants have been credited with the full value of commercial FM radio retransmissions, although the value of such transmissions is *de*

minimus. Nonetheless, Music Claimants presented evidence of carriage of radio station WFMT, a selection of Statements of Account reflecting carriage and documents from BMI's Licensing Department that show that distant signal radio carriage continued in 1998 and 1999 as it had in previous years. Krupit D.T. at 9-10; Music Claimants' Exs. 35, 36.

D. The Quantitative Data Shows Increased Music Use

1. The Music Claimants' Music Use Study

a. Summary of Study

111. The Music Claimants presented an objective music duration study that provided evidence comparing the quantity of music contained in non-network programming broadcast on local stations that were retransmitted as distant signals on cable in the years 1991 and 1992 with the quantity of music in the years 1998 and 1999.[14] Krupit D.T. at 1.

112. It was proper for the Music Claimants to study music density because Music Claimants collect this data in the course of their day-to-day activities, rely on it in negotiating license agreements, and use it in cases before the Rate Courts. Boyle Tr. 4419:8 - 4420:12; see also, e.g., Capital Cities/ABC, Inc., 831 F. Supp. at 156; Buffalo Broadcasting, 1993 WL 60687 at *43.

113. In this proceeding, Music Claimants studied the duration of copyrighted music on a minutes-per-program hour basis. As stated above, duration is one music measurement the parties consider when negotiating licenses. Boyle Tr. 4419:8-4420:12. It is a straightforward measure of music use that erases the complexities inherent in using a credit-based or other use-weighted study. Boyle Tr. 4441:2-4442:20, 4855:4-4857:9.

[14] Network programming includes nationally broadcast network programming on the ABC, NBC and CBS networks. All other programming on local stations is considered non-network.

114. Indeed, because ASCAP, BMI and SESAC have different methodologies for weighting and valuing different uses of music, a durational music-use study is a useful and cost-efficient manner to obtain a straightforward measurement of combined ASCAP, BMI and SESAC music use. Boyle Tr. 4441:2 - 4442:20, 4855:4 - 4857:9; Boyle D.T. at 8 n.12. Moreover, as a general matter, when music use increases on a durational basis, music use also increases on a credit basis, which assigns differing values to feature, background and theme performances. Boyle Tr. 4858:17-21.

115. Music Claimants performed their music use study in two parts. First, Frank Krupit, BMI's Assistant Vice President, Operations Analysis & Information, collected and analyzed durational music-use information on a sample of distantly transmitted stations. Krupit D.T. at 1. Mr. Krupit has worked for nearly thirty years in the field of evaluation and analysis of data regarding the public performance of music. Id. Mr. Krupit, as manager of BMI's Statistical Sampling operation, regularly oversees the execution of statistical studies and music data analyses for a variety of BMI's business needs, including royalty distribution, license negotiations and litigation. Id.

116. Second, Dr. Peter Boyle, ASCAP's Senior Vice President and Chief Economist, applied weights and statistical analysis to the data compiled by Mr. Krupit to conclude that there was a statistically significant increase in the amount of music on stations carried as distant signals during the study period. Boyle D.T. 7-8.

117. Dr. Boyle, who received his Bachelor of Arts magna cum laude, Masters of Arts and Ph.D in economics from Georgetown University (Boyle D.T. at 1), is responsible for, *inter alia*, a) determining the appropriate fees for the licensing of ASCAP's repertory, b) overseeing the operation of the statistical music use surveys which identify performances of music and form

the basis of ASCAP's royalty distributions, and c) overseeing the various economic and statistical weights that are parts of the distribution system. Id. Dr. Boyle has nearly two decades of experience in this regard.

b. Time Period of the Music Use Study

118. The music use study compared the use of music during the 1991-1992 period to the use during the 1998-1999 period. Boyle D.T. at 9. Music Claimants selected these periods for a number of reasons. First, as discussed above, Music Claimants received 4.5% of the 1990 and 1991-1992 funds, the subject of the last litigated Phase I proceeding, which was the same share awarded to Music Claimants in the 1983 Proceeding and for which Music Claimants settled in each of the 1984-1989 years. Accordingly, as Music Claimants' share of each of the funds remained unchanged from 1983 through 1992, it was proper to use the most recent period, the 1991-1992 period, as the base year of the study. Boyle D.T. at 9.

119. The 1991-92 through 1998-99 time period also captured the effect of the substantial departure of WTBS from the compensable distant signal royalty pool. This departure appears to be the primary basis for certain claimants' claims of changed circumstances. See, e.g., NAB Direct Case at 3 (describing TBS conversion as a "momentous change" in the cable marketplace).

120. Finally, comparable music use information dating back to 1983 was generally unavailable. Krupit R.T. at 1.

c. Selecting the Sample

121. The Music Claimants analyzed the music used in the programming of ten stations distantly carried in 1991-1992 and fifteen stations distantly carried in the years 1998-1999. For

each year, they analyzed the non-network programming appearing on the sample stations during a composite week of seven randomly selected days.[15] Krupit D.T. at 3.

122. The ten stations selected for the 1991-1992 sample included the five stations that generated the most cable royalty fees in 1991 and 1992, according to data compiled by the Cable Data Corporation (the "Larson Data"). Krupit D.T. at 2. These stations were WTBS-Atlanta, GA; WWOR-New York, NY; WGN-Chicago, IL; WPIX-New York, NY; and WSBK-Boston, MA. According to the Larson Data, these stations, when combined, generated approximately 80.2% of the total U.S.-based royalty fees for the cable compulsory license in the 1991-1992 period. Id.

123. Dr. Boyle selected the top fee-generating stations in order to ensure that the focus of the sample was on the economic significance of a performance, which can be determined by looking to the fees generated by the stations making the performance. Boyle D.T. at 10. Thus, for example, if one station accounted for 99.9% of the fees generated, creating a sample consisting only of that one station would in essence serve as a census of all economically significant performances. Surveying the performances on the other stations (even if there were a large number of them) would add little or no meaning. Id.

124. Once the top five fee stations were chosen, a second group of five stations (WBAL-Baltimore, MD; KSHB-Kansas City, MO; KBHK-San Francisco, CA; WITN-Washington, NC; and KXIV-Salt Lake City, UT) were selected to represent the

[15] The seven days were randomly chosen in a manner that reached two objectives: the sample adequately represents (1) all the days of the week and (2) the entire calendar of the year. Krupit D.T. at 6; Krupit Tr. 4237:13-19; Boyle D.T at 12.

remaining stations, which represented 19.8% of U.S.-based cable royalty fees for the cable compulsory license in the 1991-1992 period. Krupit D.T at 2. These stations were selected at random in two different strata; those generating more and less than $250,000. Boyle D.T. App. A.

125. For the 1998-1999 period, Music Claimants altered the sample. This was done because in 1998, the carriage of WTBS-Atlanta, the station that had historically generated by far the greatest amount of royalty fees each year according to the Larson Data, was greatly reduced. As a result, in order to include a high percentage of the fees generated in the 1998-1999 sample, Music Claimants expanded their study to include the top nine United States-based stations (the tenth station in the top-ten was a Canadian station and was therefore excluded). For purposes of continuity with the 1991-1992 sample, Music Claimants included WTBS-Atlanta, resulting in a total of ten stations that generated 61.3% of the U.S.-based fees generated in the 1998-1999 Period. Krupit D.T. at 3; Boyle D.T App. A.

126. As with the 1991-1992 period, the five randomly selected stations were included to represent the music use duration on the remainder of the U.S.-based distant signal stations in the 1998-1999 period, which generated 38.7% of the U.S.-based fees in the 1998-1999 Period. Id.

d. Calculation of Duration

127. BMI obtained television programming data from TVData Technologies, Inc., in order to determine the program schedule for each of the sample stations for each day in the

composite week. After accounting for non-compensable programming,[16] the durational study examined in excess of 2,500 hours of programming for 1991-1992 and more than 4,000 hours for 1998-1999. Krupit D.T. at 3.

128. Music use in television programming is identified on logs called "music cue sheets." Cue sheets identify each use of music by the program producers and list the duration of all works performed in a program. Cue sheets generally are prepared by a program's producer and are provided to performing rights organizations on a regular basis by networks, producers and/or distributors.[17] Krupit D.T. at 3. As measured by program hours, Music Claimants were able to identify cue sheets for 77% of the programming for 1991-1992 and 73% of the programming for 1998-1999. Krupit D.T. at 9. A match rate in the 75% range is very high and gives an accurate reflection of the music use in the census. Boyle D.T at 15.

129. After analyzing the cue sheets, the Music Claimants determined the average minutes of music per program hour for each of the stations in each sample period. For the five randomly selected stations representing the remaining stations in each period, the data was averaged to create one representative station for each sample period. Boyle D.T at 13.

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[16] Music Claimants performed two separate analyses on the programming carried on WGN, one of which included all of the programming on the WGN Superstation and the other including only that which was carried on both the local and national feed. The exclusion of the substituted programming on WGN has a *de minimis* effect on the results of the music use density, reducing the average minutes of music in the study from 22.02 to 21.98 for 1998-99, an increase of 10.84% over the corresponding 1991-92 number. Accordingly, whether or not the panel finds that substituted programming on WGN is compensable in this proceeding, the evidence still supports an increase in Music's share to 5.0%. Boyle R.T. at 8.

[17] Certain program producers, particularly for Sports and News programs, regularly fail to submit cue sheets to the performing rights organizations. Accordingly, there are only small number of cue sheets from these programs in the study. Krupit R.T. at 6.

e. Addition of Station Weights

130. Music Claimants then added station weights to account for the varying economic significance of the stations. Boyle D.T. at 13-14. Because certain stations are carried more often by more systems and consequently generate more fees, they are more significant economically. Id. Accordingly, to account for the relative importance of the stations in the sample, the Music Claimants weighted the stations by fees generated, the economic unit at issue in this proceeding.[18]

131. The result of the study was that the average minutes of music per program hour rose from 19.83 minutes in 1991-92 to 22.02 minutes in 1998-99, an 11.04% increase in music use. A statistical analysis by Dr. Boyle shows the increase to be statistically significant. Boyle R.T. at 1-2.

132. Based on the music use study, in the hypothetical market, Music Claimants would seek an increase in their last negotiated fee in an amount equal to the increase in the percentage of music use. Boyle Tr. 5023. In light of the prior 4.5% awards and settlements, and the 11.0% increase in music use, Music Claimants would expect to receive a 5.0% share of distant signal royalties.

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[18] Questions were raised as to whether it was appropriate for Music Claimants to weight the stations by fees generated as opposed to *distant* fees generated due to the allocation of local fees by Cable Data Corp. Using distant fees generated would have the impact of essentially eliminating the public television stations from the 1998-1999 sample. Boyle R.T. at 8-9. Accordingly, Music Claimants re-ran the music use study weighting the 1998-1999 stations by distant fees generated. The results were virtually the same; indeed music use was slightly higher using distant fees generated (22.12 minutes as opposed to 22.02 minutes per hour). Id.

133. Even apart from its use as a comparative tool showing an increase between 1991-1992 and 1998-1999, the durational study confirms that there is a great deal of music contained in the programming carried by distant signal. The average of twenty-two minutes per program hour is roughly half of the program minutes broadcast. Boyle R.T. at 3; Walden Tr. 4085 (one hour long show is approximately 46 minutes of program time). Simply put, music adds value to all programs, or the producers would not use it. Boyle R.T. at 3; Schink R.T. at 9.

2. The 1983-1989 Data

134. The Music Claimants' duration study corroborates data from the settled 1989 case that was introduced by JSC on rebuttal. In their 1989 direct case, Music Claimants performed two music analyses: 1) an analysis by Dr. Boyle of ASCAP music use "credits" that compared use credits per program hour in 1983 and 1989; and 2) a durational study like the one performed in this case and introduced by Joint Sports Claimants on rebuttal. Schink R.T. Apps. B, C.

135. Dr. Boyle's 1989 credit study showed that the music use credits increased from 1983 to 1989 by between 6.1% and 7.1%. Schink R.T. App. B at 9. In addition, Dr. Boyle found that between 1983 and 1989, feature uses of music increased by between 36.2 and 37.6%. Id. at 12.

136. The 1989 durational study showed a weighted average of 21.8 minutes of music per program hour, an amount higher than that in the 1991-92 study, but still lower than the 1998-99 weighted average. Schink R.T. App. C (Music Exhibit No. 20).

137. The 1989 music use study strongly suggests that there was no decrease in music use between 1983, the year of Music's last litigated award, and 1991-1992, the first years of the durational study.

3. The 1983 Durational Data

138. The collection of reliable program and music use information has advanced considerably since 1983. Unfortunately, Music Claimants do not have the quality of music use information for programs broadcast on stations carried as distant signals in 1983 to make an "apples to apples" comparison with the data in the 1991-1992 and 1998-1999 music use study. Krupit R.T. at 1. At the request of the Panel, Music Claimants did perform an analysis of music use in a 1983 composite week of programs appearing on the two largest fee-generating stations in 1983, WTBS and WGN. Id. Those two stations, continued to be the most widely carried distant signals in 1991-92 and, therefore, offer a reasonable basis to compare the intensity of music use on these two distant signals in 1983 and 1991-92. Id.

139. The results of the Music Claimants' 1983 analysis indicate that, both individually and collectively, WTBS and WGN programming used a similar amount of music in 1983 and 1991-92. Krupit R.T. at 2. The average minutes of music per program hour in 1983 was 20.22 minutes for WTBS and 19.33 minutes for WGN. Id. By comparison, the average music use for those stations in 1991 and 1992 was 20.50 minutes for WTBS[19] and 18.76 minutes for WGN. Id.

140. Although the data is incomplete, a comparison of the music use information on WTBS and WGN in 1983 and 1998-1999, as weighted by fees generated, shows an 11% increase in music use (same as the study shows from 1991-92 to 1998-99).

[19] As discussed in the rebuttal testimony of Dr. Peter Boyle, this number reflects a small increase from the number originally set forth in the 1991-92 music-use study because of the correction of an error in the calculation of the minutes of music in the program *Night Tracks*.

4. There Is No Evidence In the Record That Music Use Has Decreased or That Cable Operators Value Music Less Than They Did Previously

141. The Music Claimants' duration study is the only evidence of 1998 and 1999 music use in the record. Despite evidence that certain types of programming may have increased or decreased between 1992 and 1998, no evidence other than Music Claimants' was submitted showing the effects such changes in programming had on music use. See, e.g., Fratrik Tr. 2096:13-20 (use of music on programming carried by distant signal was beyond the scope of his study). Similarly, although NAB had data that categorized programs as either Music or Music Special for 1992, 1998 and 1999, no analysis of that evidence was made. Fratrik Tr. 2097:18-2098:9.

142. The only other music use evidence, the decisions referencing evidence submitted in the Noncommercial Educational Broadcasting Section 118 rate proceeding (Docket No. 96-6 CARP NCBRA), and the music use data cited in Buffalo Broadcasting, supra, suggest there was no drop in music use since 1983. PTV Demo 5; JSC Demo 19. Whatever relevance such studies have to this case, they cannot be used to rebut Music Claimants' study showing an increase in music use through the 1998-1999 period. The music use study relied upon by the Panel in the Section 118 proceeding measured only music use on the PBS National Feed (and not the actual stations) between the years 1992 and 1996. The music use study in Buffalo Broadcasting analyzed ASCAP music use "needledrops" on local stations through the 1980s. Neither touch upon the central question here – whether music use changed on distantly retransmitted broadcast stations between 1983 or 1991-92 and 1998-1999.

143. There is no evidence in the record that music use decreased between the last litigated award to Music Claimants in 1983 and 1991-92. Indeed, the evidence of Music

Claimants' 1989 study show an increase in music use between 1983 and 1989. Schink R.T. App. C.

144. There was also no evidence presented by any claimant group that music value of music to cable operators decreased between 1983 or 1991-92 and 1998-99. See, e.g., Trautman Tr. 577 (Bortz survey "does not directly ask respondents about music."); Rosston Tr. 2909 (put music aside when conducting his study because he did not have any data related to music); Johnson Tr. 3836 (PTV study ignores entirely the value of music that is used in the various programming types); Kessler Tr. 6422 (Nielsen studies do not measure relative viewing as it relates to Music); Ringold Tr. 5943 (neither Canadian operator survey, nor the Bortz study say anything about the value of music).

5. Dr. Schink's Unfounded Criticism of the Music Use Study

a. Use of Feature Music

145. Testifying on behalf of the Joint Sports Claimants, Dr. George R. Schink criticized Music Claimants' durational study because it failed to distinguish between different uses of music (i.e. feature, background and theme). Schink R.T. at 10. However, BMI and ASCAP each have different definitions for these types of performances and those definitions change over time. Boyle Tr. 4440. The evidence shows that any increase in overall duration will track reasonably closely feature, background, and theme classifications. Boyle Tr. 4858.

146. Any argument that the increase in music use is predominantly due to theme or background music ignores the substantial increase (more than 30%) from 1983 to 1989 in the number of feature performances as calculated using ASCAP's use credit system. Schink App. B at 12.

147. Moreover, in 1998 and 1999 episodic television was making greater use of feature music. Walden D.T. at 6,7; Lyons D.T. at 14-15.

b. Weighting of Stations

148. Dr. Schink wrongly contends that Dr. Boyle should not have weighted the stations, but instead should have taken a simple average. Schink R.T. at 11-12. However, it is necessary to weight the stations in order to assign appropriate relevance to each station. Boyle Tr. 4448.

149. Dr. Boyle, who has decades of experience in creating music use samples, explained that the creation of the samples was based on the economic significance of the stations. Boyle Tr. 4786-4787. He included the top fee-generating stations in order to assure consideration of the most economically significant stations. Boyle Tr. 4454-4455, 4793. The remaining stations were properly randomly sampled using a strata based on fee generation. Id. The appropriateness of the sample – which was created using the economic criteria of fee generation – depends on the eventual addition of economic weights using the same criteria. Id. at 4786-4793. Without adding the weights, the sample itself would be incomplete. Id.

150. The need for weighting is recognized in each of the studies submitted by the other claimant groups. See, e.g., JSC Ex. 1 at 46-48, 51-53 (Bortz numbers are stratified and then adjusted), Lindstrom Tr. 7205:6-7207:19, 7218:12-7219:10, 7224:20-7226:4, 7231:18-7232:11 (Nielsen adjusts data by such factors as demographics, stations and number of households), Johnson D.T. at 12-23. All have weights that differentiate between stations or cable systems.

151. Finally, Dr. Schink testified that weighting by fees-generated makes statistical analysis of the number meaningless because the fee-generation weights are not fixed. Schink Tr.

8515-8516. However, Dr. Schink cited no support for this conclusion beyond his own interpretation of unnamed statistical textbooks. Schink Tr. 8519.

152. Dr. Boyle, on the other hand, constructs and supervises music use samples and surveys in the ordinary course of his daily business. Boyle D.T at 11; Boyle Tr. 4788, 4810-4811. He has also designed music-use samples in many other contexts and in numerous rate negotiations and proceedings. Id. Dr. Boyle concluded that weighting the stations not only was necessary to the construct of the sample but was appropriate in performing statistical analyses. Boyle R.T. at 1-2; Boyle Tr. 4814-4815.

E. Dr. Schink's Rebuttal Testimony Is Not a Proper Basis for Calculating Music Claimants' Share

153. None of the other claimants addressed Music Claimants' allocation in their Direct Cases. In its Rebuttal Case, JSC presented testimony and exhibits sponsored by Dr. Schink which, JSC asserted, suggested that Music Claimants' allocation should be set at a level substantially below the share Music Claimants have received in every litigated proceeding since the inception of the cable compulsory license. See, generally, Schink R.T. As Dr. Schink's proposal was raised for the first time on rebuttal, Music Claimants had no opportunity to submit testimony or substantive evidence to respond.

154. Dr. Schink opined that Music Claimants' share should fall somewhere between (a) the ratio of music license fees for all broadcast television to the sum of music fees plus broadcast rights expenses (2.33%), and (b) the ratio of music license fees to his estimate of the programming expenses for all television combined (1.49%). Schink R.T. at 14-17. Dr. Schink also calculated the ratio of his estimates of music license fees in the cable network industry to programming expenses of the cable networks Schink R.T. at 17-20. For the following reasons, Dr. Schink's testimony should be rejected.

1. Dr. Schink's Ratio of Music License Fees to Broadcast Rights and Other Program Expenses

155. Although Dr. Schink represented that his study was true to the "general concept" that the CRT adopted in the 1978 proceeding (Schink D.T. at 16), the data relied on by Dr. Schink does not provide the information necessary to duplicate the methodology followed by the CRT in the 1978 and 1979 proceedings. Schink Tr. 8477:4-16, 8565:8-15. Moreover, as discussed below, the CRT in 1978 and 1979 determined Music Claimants' share based on other incalculable factors in addition to the ratio of local broadcast station music fees to program expenses. Accordingly, even if Dr. Schink had data identical to the CRT, there is no way to mathematically re-create how the CRT reached its share for Music in 1978, 1979 or 1980. Schink Tr. 8564:1-7.

a. The Census Data Combines Network and Station Expenses and is Not Comparable to Data Considered by the CRT.

156. Dr. Schink used data collected and published by the United States Census Bureau in the 1998 Annual Survey of Communications Services (the "Census Data") to make calculations concerning the expenditures by broadcast television on music license fees, broadcast rights, and an estimate of total programming expenses.[20] Schink R.T. at 15.

157. The Census Data reported total dollar levels of "Music license fees" and "Broadcast rights" for the broadcast television industry as a whole, failing to separate Network and local television station expenses. Schink R.T. at App. F-17. Similarly, the Census Data does not include any separate data concerning "programming expenses" but, instead, compiles and

[20] After 1998, the Census Bureau changed its data collection procedures and, apparently, no comparable data listing music license fees exists for the year 1999 or for any subsequent year. Schink R.T. at App. F-1.

publishes, again for the entire television broadcasting industry – including for both Networks and local stations, data concerning total amounts expended in broad, inclusive, categories such as "annual payroll," "depreciation," and "insurance", without differentiating or separating such expenses among programming, administration, sales, transmitting or other broadcast industry functions. Schink R.T. at App. F-22 - F-24.

158. Dr. Schink's calculations, therefore, were based on combined expenses of the Networks and local television stations. Schink Tr. 8564:17-8565:15, 8587:13-18, 8593:20-8594:2; Schink R.T. at 14-17, App. F.

159. In contrast, in the 1978 and 1979 proceedings, the CRT examined the ratio of music license fees to the broadcast rights expenses and other program expenses of the local television stations. 1978 Decision, 45 Fed. Reg. at 63,040; 1979 Decision, 47 Fed. Reg. at 9894; Schink Tr. 8565:12-15, 8676:4-19. The CRT examined data collected and published by the FCC, the Television Broadcast Financial Data ("FCC Data"). 1978 Decision, 45 Fed. Reg. at 63,040; 1979 Decision, 47 Fed. Reg. at 9894; Schink App. E-3. The FCC Data separately listed the revenues and expenses of the Networks, the network owned and operated VHF stations, the network affiliates (VHF and UHF) and the independent stations (UHF and VHF). Schink App. E-1, E-3; Schink Tr. 8570:18 - 8571:19. Accordingly, it was a simple matter to examine station-only expenses.[21]

160. The CRT in the 1978 and 1979 proceedings did not consider any expenses of the Networks. 1978 Decision, 45 Fed. Reg. at 63,040; 1979 Decision, 47 Fed. Reg. at 9894; Schink Tr. 8565:12-15, 8565:22 - 8566:7, 8587:8-12. Dr. Schink acknowledged that the CRT did not

[21] 1980 was the last year for which the FCC compiled television broadcasting financial data. Schink Tr. 8543:13-14.

consider Network expenses in 1978 and 1979 because Network programming is not compensable in these proceedings. Schink Tr. 8676:4-19; 17 U.S.C. §111(d)(3).

161. Indeed, prior to Dr. Schink's testimony, neither Music nor any other party had ever suggested or presented the argument that music license fees should be compared to the expenses of the Networks.[22] 1978 Decision, 45 Fed. Reg. at 63,030; 1979 Decision, 47 Fed. Reg. at 9885; Schink Tr. 8565:12-15, 8679:17-22. There is no dispute the Networks pay substantial sums for the rights to broadcast most professional sports viewed outside of ESPN, first run television series and first run feature films (e.g., Tagliabue D.T. at 4), none of which are compensable in this proceeding. 17 U.S.C. § 111(d)(3); JSC Opening Statement Tr. 75:12-17; Schink Tr. 8566:8-12.

162. Far from duplicating the calculations made by the CRT in 1978 and 1979, Dr. Schink calculated the ratio of music license fees to broadcast expenses and his estimates of total programming expenses for all broadcast television, that is, Networks and local stations combined. Schink Tr. 8564:17 - 8565:15, 8587:13-18, 8593:20 - 8594:2.

163. Furthermore, in its calculations, the CRT also weighted the values of the different types of local stations to reflect properly their relative contributions to the royalty pool. Thus, the ratio of music license fees to program expenses for network affiliates was given a reduced weight because carriage of such stations generated a relatively small percentage of the royalty fund as compared to independent stations. See, e.g., 1978 Decision, 45 Fed. Reg. at 63,040. Dr. Schink made no effort to weight the data to reflect the relative contributions of different stations.

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[22] This type of analysis is not unique to Music. The direct cases of other claimants specifically excluded network programming from their analysis of compensable programming. See, e.g., NAB Ex. 10 at 9 (Fratrik study); Kessler D.T. at 21.

b. Dr. Schink's Estimates of Program Expenses Are Unreliable.

164. As shown above, unlike the FCC Data, the Census Data not only fails to separately set forth station and Network expenses, and does not separate programming expenses from non-programming expenses except that music license fees and broadcast rights fees are separately listed. Schink App. F-1; Schink Tr. 8591:7-14.

165. To arrive at his estimate of the ratio of music license fees to program expenses for 1998, Dr. Schink had to make a number of assumptions and perform certain calculations. Schink App. E-1 - E-2, F-1 - F-3; Schink Tr. 8588:5-13.

166. Dr. Schink had to estimate the remaining other program expenses for both Networks and local stations. Schink R.T. at 15 n.18, App. F-1; Schink Tr. 8591:7-8592:22. Dr. Schink based his 1998 estimate for the ratio of programming to non-programming expenses on the 1980 FCC Data ratio of programming to non-programming components of payroll and other operating expenses. Schink R.T. at 15 n.18; Schink R.T. at App. F-1. Dr. Schink assumed that the ratio of program expenses to non-program expenses (except broadcast rights and music license fees), for all Networks and local stations combined, was the same in 1998 as it was in 1980. Schink R.T. at App. F-1; Schink Tr. 8590:19 - 8592:22.

167. That was not a simple process, however, because the 1980 FCC Data itself combined certain program and non-program expenses for the Networks (as the Networks' methods of treating technical and program expenses differed among the Networks). Schink R.T.

at App. E-7 n.2; Schink Tr. 8571:3-8573:4, 8592:16-22.[23] Accordingly, before he could apply the 1980 ratios to the 1998 Census Data, Dr. Schink first had to estimate the 1980 Network program expenses. Schink R.T. at App. E-1 - E-2. He did this by assuming that, in 1980, the ratio of certain programming to technical expenses for the Networks was the same as that ratio for the local stations. Schink Tr. 8572:21-8573:15.

168. There is no evidence to support Dr. Schink's assumptions, as described above. Schink Tr. 8573:9-15.

c. Removing the Network Expenses Results in a Significantly Higher Share for Music Claimants.

169. It is impossible to calculate the precise impact of Dr. Schink's decision to depart from the approach utilized by the CRT and to include Network data. Music Claimants, however, presented impeachment evidence to show that Dr. Schink's inclusion of Network expenses significantly decreased the percentage of music license fees as compared to the sum of music fees and broadcast rights expenses, and total program expenses. Music Claimants' Ex. 2 RX.

(i) Music Claimants' Impeachment Using Dr. Schink's Methodology

170. In 1980, the last year for which separate local station and Network data is available in this record, the local stations paid 89.65% and the Networks paid only 10.35% of all music license performance fees paid by stations and Networks. Schink R.T. at App. E-1; Schink Tr. 8574:8 - 8575:3; Music Exs. 1RX, 2RX. In contrast, the stations paid only 22.71%, of all broadcast rights expenses incurred by stations and Networks in 1980 ("rental and amortization of

[23] This was not an issue in the 1978, 1979, or 1980 proceedings because the CRT did not consider any Network expenses. 1978 Decision, 45 Fed. Reg. at 63,040; 1979 Decision, 47 Fed. Reg. at 9894; 1980 Decision, 48 Fed. Reg. at 9558; Schink Tr. 8565:12-15, 8565:22-8566:7, 8587:8-12.

film and tape" and "other program expenses"), and the Networks paid 77.29%. Schink R.T. at App. E-1; Schink Tr. 8578:7-19; Music Claimants' Exs. 1RX, 2RX. In 1980, the Networks paid 54.72% and the stations paid 45.28% of all other program expenses (total program expenses less broadcast rights and music license fees) incurred by stations and Networks combined. Schink R.T. at App. E-1; Music Claimants' Exs. 1 RX at 1, 2 RX at 2. According to Dr. Schink's adjustments to Network program expenses in 1980, the Networks paid 44.86% and the stations paid 55.14% of all other program expenses (total program expenses less broadcast rights and music license fees) incurred by stations and Networks combined. Schink Tr. 8581:21-8582:12; Music Claimants' Exs. 1 RX at 2; 2 RX at 3.

171. Music Claimants showed that if, as Dr. Schink assumed, the relationship between Network and local station expenses that existed in 1980 (the FCC Data) was the same in 1998, the television stations' music licensing fees would have been $204.4 million, television station broadcast rights payments would have been $2.173 billion, and other program expenses would have been $3.031 billion. This produced a ratio of music licensing fees to the sum of music license fees and broadcast rights payments of 8.6%, in comparison with Dr. Schink's estimated 2.33%. Music also used Dr. Schink's methodology of assuming that expense ratios for 1980 were the same in 1998, to show that if the Network expenses are excluded from Dr. Schink's 1998 figures, the ratio of music license fees to all other programming expenses for 1998 is 4%, as compared to Dr. Schink's 1.49% calculation. Music Claimants' Ex. 2 RX.

172. Dr. Schink argued that it was unreasonable for Music Claimants to assume that the expense ratios were the same in 1998 as they were in 1980, and he attempted to demonstrate that the results reached through Music Claimants' estimates were incorrect; however, that the 1998 and 1980 ratios are the same is exactly what his program expense estimates assume.

Schink Tr. 8600:20-8602:13. In any event, Dr. Schink did ultimately acknowledge that the inclusion of the Network data could produce ratios significantly different from the ratios that would have resulted from the analysis of data derived solely from television stations.[24]

(ii) Music Claimants' Impeachment Using Station Expense Data from the NAB.

173. When he performed his analysis, Dr. Schink was aware of, but did not use, readily available 1998 station data published by the NAB, the "1999 Television Financial Report" ("NAB Data"). Schink Tr. 8634:8-8636:7; Music Claimants' Ex. 3 RX. Dr. Schink chose instead to use the Census Data, which combines Network and local station expenses, and does not segregate program and non-program expenses.

174. The NAB Data is based on surveys of the local broadcasters for use by the local broadcasters. Music Ex. 3 RX at i. Questionnaires are mailed to "all commercial TV stations." Music Claimants' Ex. 3 RX at i. The NAB Data is based on a final response rate of 70.9%. Music Claimants' Ex. 3 RX at i.

175. The Census Data on which Dr. Schink relied comprises estimates "obtained from a sample of employer firms". Schink R.T. at App. F-16, F-17. The Census Data does not reveal the sample size or the response rate achieved. Schink R.T. at App. F. Dr. Schink does not know whether the Census Data is more or less reliable than the NAB Data. Schink Tr. 8638:4-10.

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[24] In apparent recognition of the fact that the inclusion of television network data in his study rendered it inconsistent with the CRT's approach and resulted in an unjustified reduction in Music Claimants' share, Dr. Schink identified for the first time in his oral testimony and described for the first time on redirect examination a procedure he had developed "probably in the last four or five days" using data from several different sources and from several different years which allegedly corrected the distortion created by the inclusion of network data in his original calculations of the ratio of music license fee to program expenses. Schink Tr. 8607:19-8608:9, 8622:15-8623:1, 8771-8772. No supporting documents or calculations were provided to support this 11th hour concoction and it should be accorded no weight by the Panel.

176. Music introduced the NAB Data on cross-examination of Dr. Schink. Music Claimants' Ex. 3 RX. The NAB Data includes the revenues and expenses of the network affiliates and stations – broadcasters whose programming is compensable in this proceeding – and certain calculations and comparisons the local television industry presumably finds useful. Id.

177. The NAB Data reports that the national average ratio of music license fees to program expenses, for all stations, was 6.9% in 1998. Music Claimants' Ex. 3 RX, at 35, 123, 147, 157, 165, 173 (line 4, col. 3 under "National Comparisons").

d. A Trending Comparison of the Ratio of Local Broadcast Station Music Fees to Program Expenses between 1983 and 1998 and 1999 is Not Possible.

178. Not only is a replication of the 1978 CRT Music determination not possible, but an accurate determination of whether music license fees as a proportion of broadcast rights fees or other station expenses shows any trend up or down since 1983, the last proceeding when music litigated is impossible based upon the evidence in the record. First, 1983 data is not in the record as the FCC stopped publishing such information in the early. Schink Tr. 8543:13-20. Similarly, 1999 data is not in the record. See infra ¶¶ 187-188. Second, it is impossible to know whether expenses categorized by Dr. Schink as "broadcast rights", the columns labeled "Rental and Amortization of Film and Tape" and "Other Performance and Program Rights" in the 1980 FCC Data, are the same or even fairly comparable to the Census Data category called "Broadcast Rights", or the NAB Data category called "Amortization Costs-Broadcast Rights" (or "Cash Payments-Broadcast Rights"). Compare Schink R.T. at App. E-3, F-17, with Music Claimants' Ex. 3 RX. Similarly, the items included in the 1980 FCC Data as "Program Expenses" may not be accurately compared to the combined operating expenses identified in the Census Data for

1998, and a clear comparison to the NAB Data is equally difficult because the expenses are set forth by departments. Id. The only comparisons that can be made, based on record evidence, are between 1980 and 1998, and the Panel can have no assurance that the categories being compared are analogous.[25]

179. Finally, as discussed below, final local station license fees are not available for 1998 and 1999. It would be unreasonable to determine Music's final share in this proceeding based on interim fees paid in another marketplace. See infra ¶¶ 196, 207.

180. If the Panel is inclined to examine the trend in the ratio of music license fees to broadcast expenses or program expenses (an approach Music urges should be rejected altogether), the only "apples to apples" comparison that can properly be made based on the available evidence is for independent stations only in 1980 compared to the combination of non-ABC, NBC and CBS affiliated stations in 1998.

181. A comparison of expense ratios for all local stations is problematic for a number of reasons. First, as discussed above, Network affiliated stations pay at a ¼ DSE rate and therefore generate an insignificant amount of the fees and receive a very reduced weight. See supra. ¶ 163. Second, a significantly high percentage of Network affiliates' expenses are spent on news programming. As discussed below, the value of news on distant signals to cable operators is way below the percentage of stations' news expenses. See infra ¶ 210. Finally, accounting for Dr. Schink's testimony that Network affiliate data is suspect, use of all local stations for a trending comparison is problematic.

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[25] Music Claimants believe, as they did in 1980, that the analogy of music license fees for local television is not appropriate. 1980 Decision, 48 Fed. Reg. at 9558. Music Claimants include these facts only to impeach and respond to the approach suggested by Dr. Schink.

182. A comparison of the 1980 FCC Data and the 1998 NAB Data shows that, when the network affiliates are isolated and only non-Network stations are analyzed, there is no discernible downward trend in the ratio of music license fees to either broadcast rights or program expenses. Schink R.T. App. at E-3; Music Exs. 3 RX, 4 RX.

183. The 1980 FCC Data shows that independent stations (both UHF and VHF combined) paid $12.2 million in music license fees, and spent $263.5 million on "rental and amortization of film and tape" and "other performance and program rights" combined (Dr. Schink's "broadcast rights" categories). Schink R.T. at App. E-3. The total program expenses for the independent stations were $380.8 million. Schink R.T. at App. E-3. Accordingly, the ratio of music license fees to broadcast rights was 4.63% and the ratio of music license fees to total program expenses was 3.2%.

184. According to the 1998 NAB Data, non-network affiliated stations paid $90.1 million in "music license fees"[26] as compared to "amortization costs - b'dcast rights" payments of $1.868 billion. And, if the Panel assumes (as we expect other claimants will urge) that station total "program expenses" must be the entire sum of the expenses of the Program, Production and News departments, the total is $2,751 billion.[27] Accordingly, in 1998, the ratio of the music

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[26] There was much confusion about the actual amount of local fees paid by the stations. Dr. Schink was unclear about the differences between fees paid to the performing rights organizations and total fees paid by the local stations – which are different numbers, due to per-program and direct licensing. In any event, for this purpose, few, if any, independent stations pay per-program fees, Boyle Tr. 4488:2-18, and accordingly the $90.1 million number reported by the NAB Data is not unreasonable.

[27] Dr. Schink testified that the NAB expense numbers may misreport total program expenses. Schink Tr. 8641:13 - 8643:10. To the extent that the expense number is incorrect, the Panel must recognize that the reported Music fees are interim fees, and therefore are similarly misrepresented. In any event, to the extent there is underreporting of fees or expenses, it only serves to underscore the conclusion that the 1980 CRT reached – that the Panel cannot reasonably use any local station expense data to calculate Music's share.

license fees to broadcast rights was 4.86%, and the ratio of music license fees to the combined program production and news department expenses was 3.3%.

185. Therefore with respect to both broadcast rights and combined departmental expenses, when only non-Network affiliated stations are considered, there is a slight upward trend in the music license fee percentage.

186. Similarly, with respect to both broadcast rights and total program expenses, when non-Network affiliates are considered, there is a slight upward trend in the music license fee percentage.

e. Dr. Schink Presented No Data For 1999

187. The Census Bureau did not compile or publish Music Licensing Fee data for 1999 and subsequent years and Dr. Schink presented no other data upon which to determine Music's share in 1999. Schink Tr. 8676:21-8677:13. Apparently, Dr. Schink assumed that – for the purpose of calculating an allocation to Music Claimants for the years 1998 and 1999 – the year 1999 would be identical to the year 1998. No evidence was presented in support of this assumption.

188. In fact, an examination of the Census Data for the years 1991-1998 demonstrates that there has been a substantial year-to-year variation in the television broadcasting industry's reported Music License Fee expenditures (e.g., a 20.4% decline from 1992 to 1993 and a 24.7% increase from 1994 to 1995). Schink R.T. at App. F-16. Such variation would also produce a significant variation in the ratios utilized by Dr. Schink to calculate Music Claimants' allocation. Schink R.T. at App. at F-17.

2. Dr. Schink's Estimates of the Ratio of Music License Fees to Cable Network Expenses

189. Dr. Schink also attempted to calculate the ratio of music license fees to program expenses for the cable networks, based on survey data published in Kagan World Media, "Economics of Basic Cable Networks 2003" ("Kagan"). Schink R.T. at 17-20, App. H.

190. Dr. Schink based the conclusions on page 18 of his rebuttal testimony on the ASCAP Rate Court's setting of interim cable license fees in 1989, a BMI press release concerning final license fees for two music cable networks, the cross-examination of Dr. Boyle in this proceeding, two undisclosed confidential BMI documents, and an offer ASCAP made to the National Football League. Schink R.T. at 18, App. H-1 - H-2; Schink Tr. 8467:12-8468:4, 8477:4-11.

191. In 1978 and 1979 (and 1980), the CRT did not examine the ratio of music license fees to other expenses of cable networks. Schink Tr. 8566:6-7, 8679:17-22, 8680:17-20; 1978 Decision, 45 Fed. Reg. at 63,040; 1979 Decision, 47 Fed. Reg. at 9894; 1980 Decision, 48 Fed. Reg. at 9566-9567.

192. The evidence shows that some cable networks – such as MTV, TBS, Discovery Channel, and USA – have reached final agreement with and have paid ASCAP or BMI final license fees. Boyle Tr. 4429:6 - 4430:16, 4542:21-4546:16; Schink R.T. at 18; Schink Tr. 8467:8-8468:4. Some cable networks paid ASCAP for 1998 and 1999 at interim license fees determined in a rate court interim fee decision entered in 1989. Boyle Tr. 4430:17-22, 4433:8-20, 4546:7-9; Schink Tr. 8672:8-8673:5; see, e.g., United States v. Am. Soc'y Composers, Authors & Publishers (Application of Turner Broad. Sys., Inc.), Civ. 13-95, slip op. at 24 (WCC) (S.D.N.Y. Oct. 12, 1989).

193. The record contains no evidence with respect to the actual amount or rate of music license fees that were paid for 1998 or 1999 for a large number of the cable networks for which Dr. Schink included "estimates." Boyle Tr. 4544:18-21, 4545:14-18. For example, there is no record of whether, how much or at what rate many basic cable networks – such as MTV, VH1, Nickelodeon, Showtime, The Movie Channel, Independent Film Channel, BET, TNT, CNN, Headline News, Cartoon Network, TBS, USA, SciFi Channel, Lifetime, the History Channel, the Discovery Channel, Comedy Central, E! Entertainment, ESPN – paid in music license fees. Boyle Tr. 4543-46, 4728-29, 4768-70, 4772-74.

194. Some cable networks pay a percentage of their revenues in interim or final music license fees, some pay a rate per subscriber, and others pay a flat fee. Boyle Tr. 4542:21 - 4546:16; Schink Tr. 8480:22-8481:10.

195. Dr. Schink performed his calculations two ways: (1) based on his estimates of the maximum license fees the performing rights organizations might receive for 1998 and 1999 from each of the cable networks in his categorization of the different cable networks (Schink R.T. at App. H-4 - H-5); and (2) based on his extrapolation to all networks in each of his categories, the interim license fees paid by a few cable networks to ASCAP (Schink R.T. at App. H-10 - H-11). Schink Tr. 8469:4-8470:20, 8471:3-8473:5, 8669:9-8670:16.

196. Dr. Schink used incomplete evidence of a mix of interim and final license fees paid by some cable networks to either ASCAP or BMI to estimate uniform percentage of revenue rates for all performing rights organizations, which he applied to his categorizations of cable networks into groups. Schink R.T. at 18; Schink Tr. 8467:8-8468:4, 8670:17-8672:2.

197. Dr. Schink based his conclusions on an estimated percentage of revenue rate for all cable networks. Schink Tr. 8669:9-8672:16, 8477:4-11. Then Dr. Schink converted his

percentage of revenue rates into dollar amounts. Schink Tr. 8477:4-11, 8669:9-8670:16; Schink R.T. at App. H-2. Finally, Dr. Schink calculated the ratio of those dollars to the dollar amounts spent by the cable networks on programming accordingly to published Kagan data. Schink Tr. 8669:9-8670:16; Schink R.T. at App. H-2.

198. Dr. Schink is not aware of any cable network music license that is based on a percentage of the cable networks program expenses. Schink Tr. 8480:16-21.

199. Dr. Schink was not able to advise what expenses were included as "program expenses" of the cable networks, as reported in the Kagan data on which he relied. Schink Tr. 8690:3-8691:20. Dr. Schink testified that "Kagan is not very good about defining terms . . . ." Schink Tr. 8691:16.

200. In performing his calculations, Dr. Schink included many cable networks that are start-ups – that have little or no revenue, but that spent considerable sums on programming to build an audience or market. Schink Tr. 8680:1-5; Schink R.T. at App. H-4. Many startup cable networks have inflated programming expenses relative to their revenues. Schink Tr. 8680:14-8681:4; Schink R.T. at App. H-4. For example, 7 of the 13 cable networks categorized by Dr. Schink as "music", spent more in program expenses than their revenues. Similarly, 17 of 49 "General Entertainment" networks, 3 of 10 "news and public affairs" channels and 3 of 7 sports networks all spent more than their revenues on program expenses. Schink R.T. at App. H-4 - H-5, H-10 - H-11.

3. The Propriety of Dr. Schink's Approaches

a. Music License Fees Set in Market Negotiations Bear No Relationship to the User's Broadcast Rights or Other Expenses

201. There is no evidence that any actual music performance license fee or rate for television has ever been negotiated or determined by a rate court based on a percentage of or ratio to the music user's broadcast rights expenses or other program expenses. Schink Tr. 8480:16-21, 8533:16-21, 8534:4-8; Boyle Tr. 4418:20-4420:12. Accordingly, there is no evidence that in an open market, the music performance license fee or rate for the cable operators would bear any relationship to the amounts spent on broadcast rights or other programming expenses by Networks, local stations, or cable networks.

202. In the noncommercial broadcasting rate adjustment proceeding, the Panel rejected the notion that program expenses is a proper basis for determining music license fees. NCBRA Decision at 15-16.

b. Broadcast Station License Fees and Other Expenses Are Not An Apt Analogy for Determining the Relative Value of Any Claimants' Copyrighted Material

203. The only time that expenses were compared to music license fees for purposes of determining a music license "fee" was in the CRT proceedings in 1978 and 1979. In those cases, there was no long history or precedent on which to base a claim or award for Music or any other claimant in these proceedings. Schink Tr. 8542:1-10. The only evidence the CRT had to go on was that submitted by Music, and the Panel rejected Music's approach as valuing Music too high. 1978 Decision, 45 Fed. Reg. at 63,040. Accordingly, the CRT performed an adjustment to the available evidence, which included a calculation of the ratio of music fees to all program expenses. Id.

204. Nearly twenty-five years have passed since the CRT's determinations of Music's share in 1978 and 1979. Id.; 1979 Decision.

205. Music abandoned the formula approach in the 1980 proceeding, and instead presented a variety of other evidence to show how much music is used and the important contribution music adds to all television programs and movies. 1980 Decision, 48 Fed. Reg. at 9557-58, 9566-67. Music made a similar presentation in the instant proceeding. See, e.g., Saltzman D.T. at 10-15; Walden D.T. at 1-10; Lyons D.T. at 3-22; David D.T. at 3-15 (incorporated by reference); Hagen D.T. at 2-14 (incorporated by reference).

206. In the 1980 proceeding, the CRT endorsed Music's decision to move away from an attempted formula, finding that Music Claimants "have abandoned their sole reliance on the mechanistic application of a single formula." 1980 Decision, 48 Fed. Reg. at 9566. "The Tribunal in various proceedings has expressed its major reservations about the use of formulas." Id. The CRT rejected the notion that Music's relative fair market share can be accurately quantified by any mathematical formula. Id. at 9567. The CRT in the 1980 Proceeding briefly considered station expenses and music license fee payments, the fact that the ratio of music license fees to other program expenses had declined. Nevertheless, the CRT rejected that factor and, despite evidence that the ratio of music license fees to program expenses decreased from 1979 to 1980, the CRT concluded that "an award of 4.25% continues to be reasonable" and awarded Music the same share for 1980 as for 1979. Id. at 9566-67.

207. One of the chief reasons articulated by the CRT in 1979 for discounting the impact of the local stations' music fees was that the stations had been paying interim music rates set years earlier. Id. at 9567. The record indicates that, at least with respect to ASCAP, the same was true in 1998 and 1999 for the stations and many cable networks. Boyle Tr. 4430:17-22,

4433:8-20, 4546:7-9. ASCAP's interim cable rates date back to 1989. United States v. Am. Soc'y Composers, Authors & Publishers (Application of Turner Broad. Sys., Inc.), Civ. 13-95, slip op. at 24 (WCC) (S.D.N.Y. Oct. 12, 1989).

208. In the 1983 Proceeding, the CRT did not consider station expenses or the music license fee ratio at all. 1983 Decision, 51 Fed. Reg. at 12,812. In that case, Music Claimants again presented a variety of evidence that demonstrated that music is vitally important to all kinds of television programming, and that music use in general had increased. Id. at 12,800-01, 12,812. Music also presented evidence to show that music videos had become an important part of television programming on a significant channel – WTBS – which generated the majority of the compulsory license fees. Id. In the 1983 Proceeding, based on the totality of the evidence, the CRT increased Music's share to 4.5%. Id. The CRT correctly observed that "as a program element [music] admits of almost no possible precise formula to determine its marketplace value." Id.

209. No other claimant group's relative share has ever been determined by comparing the amounts spent on particular categories of programming to total program expenses. See, e.g., 1978 Decision; 1979 Decision; 1983 Decision; 1990-1992 Decision.

210. The significant sums spent by the local broadcasters to develop copyrighted local news and public affairs programming is an instructive example of the problems inherent in such a comparison. Schink Tr. 8557:22-8558:9. The independent stations on average spend about 28% of their "Program" + "Production" + "News" department expenses on "News" ($640,547 ÷ $2,297,685). Music Claimants' Ex. 3 RX at 173. The Network affiliates spend almost 56% on "News". Id. at 35. This programming apparently has significant value to the local broadcasters who are willing to spend large sums and presumably sell commercial advertising to make such

expenses worthwhile. But no one has suggested that the NAB's share should approximate the ratio of news expenses to other broadcast program expenses. Common sense dictates that cable systems retransmitting in distant markets are not likely to value locally produced news and other programs as attracting and retaining many subscribers. Schink Tr. 8558:10-8559:1, 8560:1-12, 8561:2-22. In fact, prior decisions reflect the perceived lower value of local news to distant retransmissions. See, e.g., 1983 Decision, 51 Fed. Reg. at 12,811-12; 1989 Cable Royalty Distribution Proceeding, 57 Fed. Reg. 15,286, 15,302-03 (Apr. 27, 1992) ("1989 Decision").

211. Public television presents another apt example. The PTV Claimants spend huge amounts to develop and purchase programming, almost a $1 billion in each 1998 and 1999. Wilson R.T. at 4. PTV (arguably) does not sell commercial advertising, but uses its program offerings to raise billions in revenues. No claimant has suggested that PTV's share in these proceedings be based on the ratio of the amount that PTV spends on programming compared to the amount that a typical commercial broadcaster spends, or all other commercial broadcaster's combined spend.

212. There is simply no evidence in the record to support the notion that the amounts spent by the broadcast stations or cable networks (a) to purchase rights to first-run television series, movies and live sports programs, (b) to create and produce their own programs, and (c) to pay for the music in all programs, has any bearing on the value the cable systems would attribute to each element of the retransmitted distant signals. Nor do the station or cable network expenses reflect what the cable systems would be willing to pay for retransmission rights in an unregulated market.

IV. PROPOSED CONCLUSIONS OF LAW OF MUSIC CLAIMANTS

A. Introduction

213. This CARP has the responsibility to allocate the 1998 and 1999 copyright royalties paid by cable operators for the retransmission of non-network programming on distant broadcast signals under the Copyright Act of 1976 among the Phase I claimants in this proceeding: Program Suppliers, Joint Sports Claimants, NAB, Music Claimants, PBS and Canadians. 17 U.S.C. § 111(d)(4). In making its determination, the CARP should also consider the two parties – NPR and the Devotional Claimants – that have settled out of the proceeding.

214. Music Claimants represent every songwriter, composer and music publisher entitled to royalties under Section 111 for use of their copyrighted musical works in all retransmitted non-network programming. Copyright Office Final Regulations, 59 Fed. Reg. 63,025, 63,029 (Dec. 11, 1994); 1990-1992 Decision, 61 Fed. Reg. at 55655 (Oct. 28, 1996); see also Determination of the Distribution of the 1991 Cable Royalties in the Music Category, 63 Fed. Reg. 20,428, 20,429 (Apr. 24, 1998).

215. Unlike the other claimant groups in this proceeding, the performing rights organizations occupy a special place in the Copyright Act: a "performing rights society" is "an association, corporation, or other entity that licenses the public performance of non-dramatic musical works on behalf of copyright owners of such works, such as the American Society of Composers, Authors and Publishers (ASCAP), Broadcast Music, Inc. (BMI), and SESAC, Inc." 17 U.S.C. § 101.

216. Since the first distribution proceeding involving cable royalties for 1978, Music Claimants have been a Phase I party. Any decision by the CARP to allocate Music Claimant's share in different percentages vis-à-vis the other claimants in this proceeding would overturn

almost two decades of uninterrupted precedent. Furthermore, as stated below, any such decision would also be inconsistent with what would likely occur in an open market.

B. The CARP Should Base Its Allocation on Precedent and Any Changed Circumstances

217. The Copyright Act provides that, in making distribution determinations, the Panel should be guided by the relevant provisions of the copyright law, as well as "prior decisions of the Copyright Royalty Tribunal, prior copyright arbitration panel determinations, and [relevant] rulings by the Librarian of Congress." 17 U.S.C. § 802(c).

1. CRT Precedent Supports Music's Approach.

218. Prior CRT precedent established that music is a "program element" that "runs through all of the program types on distant signals." 1983 Decision, 51 Fed. Reg. at 12,812. The CRT previously determined, and the record in this proceeding confirms, that "as a program element" music "admits of almost no possible precise formula to determine its marketplace value ...." Id.

219. The CRT has also recognized that awards may be based upon an analysis of any changed circumstances since the last distribution proceeding. See, e.g., 1989 Decision, 57 Fed. Reg. at 15,288 (describing one issue considered in the 1989 determination as whether there "[h]ave there been any factual changes since 1983 which justify a change in the awards previously made"). The U.S. Court of Appeals for the District of Columbia Circuit, acting in its role reviewing CRT decisions, has also determined that:

> [I]t is entirely appropriate for the Tribunal to employ, as one of its analytical factors, the determination whether circumstances have changed in the course of the ensuing twelve months, inasmuch as that conclusion will obviously be relevant to the question whether an award should differ from the prior year's award.

Nat'l Ass'n of Broads. v. Copyright Royalty Tribunal, 772 F.2d 922, 932 (D.C. Cir. 1985).

220. The CRT's most recent decision with respect to Music (the 1983 Proceeding) increased Music's share from the prior proceeding (1980), based on Music's continued demonstration of the qualitative value music brings to all television programming, and certain "changed circumstances." These changed circumstances included the rise of music videos and "more use of music in general." 1983 Decision, 51 Fed. Reg. at 12,812.

221. In determining Music's share, as well as in its other determinations, the CRT's objective has always been to "simulate market valuation" through application of "marketplace criteria." 1983 Decision, 51 Fed. Reg. at 12,793; see also 1989 Decision, 57 Fed. Reg. at 15,288 (Apr. 27, 1992). Thus, the CRT's increased award to the Music Claimants was based upon a finding, that in addition to all other evidence presented by Music, there was "more use of music in general." This determination reflected the CRT's judgment of the relative value Music would receive in an open market – that is, what the willing buyers (in this case the cable operators) would pay the willing sellers (in this case, the Music Claimants). As the Court of Appeals has made clear, the CRT (and now the CARP) operates "as a substitute for direct negotiations . . . among cable operators and copyright owners." Christian Broad. Network, Inc. v. Copyright Royalty Tribunal, 772 F.2d 1295, 1306 (D.C. Cir. 1983).

222. In this regard, music has been found by the CRT to have "almost no possible precise formula to determine its marketplace value." 1983 Decision, 51 Fed. Reg. at 12,812. In view of the difficulty of evaluating music in an open market, it is not surprising that music license fee negotiations and rate court proceedings are based upon the same benchmark and changed circumstances approach presented by Music Claimants in this proceeding, and applied by the CRT in the 1983 Proceeding.

2. Rate Court Determinations and Market Negotiations of Music License Fees Support Music's Approach.

223. Decisions by ASCAP's Rate Court and evidence of market negotiations reflect the same market analysis of applying changed circumstances to an established benchmark. Thus, an analysis of the amount that would likely be paid for music rights in an "open market" or "hypothetical free market" leads to the same conclusion as the analysis based upon changed circumstances from the established 1983 benchmark of 4.5%.

224. The use of a benchmark as described above, as well as the use of evidence of changes in music use to adjust the benchmark rate, has been adopted by Federal district and circuit courts in exercising their authority to determine ASCAP and BMI music licensing fees. The Second Circuit has explicitly found that, "the determination of the fair market value . . . is often facilitated by the use of a benchmark . . . ." United States v. Broad. Music, Inc. (Application of Music Choice), 316 F.3d 189, 194 (2d Cir. 2003). The ASCAP Rate Court has concluded that:

> prices negotiated voluntarily in arms-length transactions offer the only palpable point from which to proceed towards an estimation of fair value for later periods

and that:

> the Court must admit that it remains incapable of quantifying the value of music to any particular television program. Not do we believe that the rate-setting function requires us to venture any such assessment. Surveying the fluctuations in the amount of music used by a network over time provides an adequate proxy by which to gauge whether the significance of music to network programming has changed relative to prior years; assuming all other factors remain constant, the direction in which a network's music use has headed should chart the course for the music licensing fees owed to ASCAP.

Capital Cities/ABC, Inc., 831 F. Supp. at 145, 156.

225. Because the rate courts have adopted the benchmark and changed circumstances approach to determine music license rates in the open market, the evidence Music presented in this case would, in the absence of the compulsory license, shape market negotiations between the cable operators and the Music Claimants. The parties to such negotiations would likely adopt positions consistent with their perception of the rate court's likely disposition of the matter in the event the negotiations did not result in an agreement.

226. In an open market, each of the performing rights organizations and cable operators (represented by the NCTA) would likely use as a "benchmark" a pre-existing litigated or settled rate or level of payment as a starting point for negotiating a blanket license rate. Capital Cities/ABC, Inc., 831 F. Supp. at 144. In the absence of a market value precedent for distant signals, this benchmark might be a rate or level of payment for similarly situated users. In this case, however, the prior litigated and settled share serves as an adequate benchmark as to share. There is no need to analogize to the rates paid by other music users.

227. In an open market in 1998 and 1999, the cable operators and the performing rights organizations would have started their negotiations with the equivalent of the 4.5% rate received by Music Claimants in the 1983 Proceeding, and in all subsequent settlements through 1991-92.

228. In these negotiations, the parties would attempt to increase or decrease the benchmark rate by presenting evidence of changed circumstances, including increases or decreases in music use, or new evidence altogether.

229. It is reasonable to conclude that, if performing rights organizations could establish that music use had increased by 11%, they would be able to negotiate music license fees in an open market with the cable operators increasing the 1991-92 share of 4.5% to 5%.

230. It is also reasonable to conclude that, in an open market, if performing rights organizations were able to demonstrate that music use had increased since the 1983 award by 11%, performing rights organizations would be able to negotiate agreements with the cable operators similarly increasing the 1983 award of 4.5% to 5%.

231. Both ASCAP and BMI licensed cable operators at the annual rate of 8.3 cents per subscriber in 1998 and 1999 for music contained in their locally originated programming. These licenses produced annual license fees to ASCAP and BMI of approximately $10 million, given 60 million subscribers to basic cable. These rates would also be taken into consideration in a market negotiation or rate proceeding to determine music license fees for the distant retransmissions.

232. There is certainly no evidence that the value, quality, or contribution of music to the overall entertainment experience produced by television programming has declined either in the television market generally or in retransmitted distant signals since either 1983 or 1991-92. In fact, there is substantial qualitative evidence that music's contribution to the overall television entertainment experience has increased. There is substantial evidence of more sophisticated use of music in television dramatic series with a resulting increase in viewer impact and entertainment value. With special reference to the distant signal market, the fact that the Super Bowl Halftime Show appeared as compensable programming in the 1998-1999 time period also adds a new dimension from past litigated proceedings to the contribution of music to the entertainment value at issue in this proceeding.

233. The performing rights organizations operate in the marketplace primarily through blanket licenses. A blanket license grants the privilege to a licensee to publicly perform any and all of the musical works within the repertory of the respective performing rights organization.

Broad. Music, Inc. v. Columbia Broad. Sys., Inc, 441 U.S. 1, 5 (1979). "Sound business judgment could indicate that such payment represents the most convenient method of fixing the business value of the privileges granted by the licensing agreement . . . ." Automatic Radio Mfg. Co. v. Hazeltine Research, Inc., 339 U.S. 827, 834 (1950), quoted in Broad. Music, Inc. v. Columbia Broad. Sys., Inc, 441 U.S. at 8-9.

234. Indeed, Congress itself has elected to use the blanket license concept in the cable television compulsory license, and other compulsory licenses.

235. As observed by the U.S. Supreme Court, "[m]ost users want unplanned, rapid and indemnified access to any and all of the repertory of the compositions . . . ." Broad. Music, Inc. v. Columbia Broad. Sys., Inc, 441 U.S. at 20. Given this demand, "[a] middleman with a blanket license was an obvious necessity if the thousands of individual negotiations, a virtual impossibility, were to be avoided." Id. In this context, the Court found that, "[t]he blanket license is composed of the individual compositions plus the aggregating service. Here, the whole is truly greater than the sum of the parts; it is, to some extent, a different product." Id. at 21-22.

236. Based upon previous agreements between cable operators and performing rights organizations as well as evidence of music licensing in general, it is reasonable to conclude that each of the performing rights organizations would negotiate a blanket license with cable operators for all programming carried by a single cable operator at a single flat dollar or flat per subscriber rate. There is no precedent in these proceedings or in the marketplace for a music license rate based on the amounts of different types of programming that are carried.

237. The case presented by the Music Claimants in this proceeding is consistent with the "changed circumstances" approach adopted by the CRT in the 1983 Proceeding, and followed by the rate courts in the unregulated market for music license fees. The Music

Claimants established that music use on the retransmitted stations – the proportion of compensable programming time during which copyrighted music is played – has increased since 1990-92 and since 1983. Music Claimants' evidence shows that, under any reasonable weighting of different stations to reflect their relative contributions to the royalty pool – including variations to address criticisms advanced by other parties – music use increased by about 11% between 1991-92 and 1998-99. The evidence that is available for a comparison between 1983 and 1998-99 also shows a statistically significant increase in music use.

C. Music Use in 1991-92 is Relevant to a Determination of Changed Circumstances.

238. Prior to the commencement of this hearing, the non-music claimants filed a Joint Motion for Declaratory Ruling Concerning the Benchmark for the Music Award ("Joint Motion"), seeking a declaration that the CARP "may not use as a benchmark, for purposes of determining 'changed circumstances,' the Music Claimants' 1991-92 settlement award." Joint Motion at 1. In response, the Office issued an Order on March 20, 2003, denying the Joint Motion. The Office found that: "A benchmark is merely a marketplace reference point; and, as such, it need not be perfect in order to be considered." The Office ruled that "the usefulness of a particular benchmark is a factual determination" and that, therefore, the Panel:

> must weigh each proposed benchmark together with the record evidence and, decide, within the context of the proceeding and in light of past precedent, whether the benchmark accurately reflects the value of the programming or, in the case of Music Claimants, the use of music during the relevant time period.

Order at 24 (Mar. 20, 2003).

239. The factual circumstances surrounding the 1991-92 settlement[28] show that Music's settled share of 4.5% is probative evidence of all parties' perceived value of music in those years, and of the absence of significantly changed circumstances between 1983 and 1991-92. The 1990-92 cable royalty funds contained approximately $540 million and Music Claimants' received in excess of $20 million as a result of the settlement. 1990-1992 Decision, 61 Fed. Reg. at 55,655. By settling with Music Claimants, the other parties did not reduce their litigation expenses by a significant amount relative to the amount of the settlement, because the other parties all litigated their claims.

240. The 1991-92 settlement, like all settlements, reflected the parties' uncertainty as to the possible outcome. In view of the very large amount of money at stake, and the marginal increased expenses the other parties would have incurred to litigate with Music, it is reasonable to conclude that the settlement reflects the other parties' perception of the fair market value of music. Not coincidently, the 4.5% settlement was the same as the 1983 award to Music Claimants based on "marketplace criteria."

241. The 1991-92 settlement is also evidence of the parties' perception of the trend in music use between 1983 and 1991-92. In settling 1991-92 distributions, the parties were aware of the 1983 CRT decision and, therefore, could have expected that the proceeding would involve an analysis of the amount of "use of music in general" (as it had in 1983). It is unlikely that the

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[28] The 1990 and 1991-92 settlements are a part of the public record. Indeed, the Librarian recommended a modification of the CARP's findings with adjustments to account for Music Claimants and NPR. 1990-1992 Decision, 61 Fed. Reg. at 55,661. The award of 4.5% was made part of the public record by both the Librarian's decision and the D.C. Circuit's opinion in Nat'l Ass'n of Broads. v. Librarian of Congress, 146 F.3d 907, 917 (D.C. Cir. 1998). Similarly, Music's settlement shares of 4.5% for 1984 through 1989 are part of the public record. See, e.g., id. at 915 (1989 share).

other parties would have settled with Music Claimants for the same 4.5% Music Claimants received in 1983, if the parties had perceived that there had been a demonstrable decline in music use between 1983 and 1991-92.

242. Significantly, the parties had also reached a settlement of the 1989 Cable Royalty Funds, which provided that Music Claimants would receive 4.5% of each of the three funds. This settlement was reached after the Music Claimants had submitted, and the other parties had had an opportunity to review, Music's direct case seeking an increase to 5%. Music's case included a music use study comparing 1983 and 1989 music use, and a 1989 music duration study.

243. Bearing all these circumstances in mind, it is reasonable to conclude that the 1991-1992 settlement reflects the parties' perception of a fair compromise, not significantly different from the result likely to be achieved in a litigated "market" analysis conducted by the CARP, taking into consideration overall music use. Accordingly, it is appropriate for the Panel to consider changed circumstances in music use since 1991-1992.

244. The language of the 1991-92 settlement Stipulation does not preclude its use in this proceeding. The language provides that no party "shall be deemed to have accepted as precedent any principle underlying, or which may be asserted to underlie, this stipulation." Stipulation of Settlement of Claim of the Music Claimants to 1991 and 1992 Cable Royalty Funds at 1 (emphasis added). Music Claimants do not assert that any of the other parties should be "deemed" to have accepted any principle underlying the 1991-92 settlement as "precedent". Rather, the Music Claimants' maintain that the 1991-92 settlement is relevant – one of a number of factual circumstances useful in determining the award to Music Claimants. The settlement language does not preclude its consideration by the Panel, and the other parties were free to

discredit any "principle which underlies, or which may be asserted to underlie" the 1991-92 Stipulation.

245. In the context of attempting to determine what would take place in a hypothetical open market, the 1991-92 settlement is also relevant. Dr. Boyle testified that in an open market, the prior litigated and settled shares would form the "benchmark" from which ASCAP would seek to negotiate a rate. In addition, a previous settled rate is the kind of evidence that a rate court would analyze as a benchmark to determine a reasonable rate for a music performance license. See, e.g., Capital Cities/ABC, Inc., 831 F. Supp. at 147-156). The process that a rate court follows – in reviewing prior negotiations, examining the context of those negotiations and evaluating whether agreements and settlement reached in such negotiations – represents evidence that can be helpful in determining a fair music rate (id.), is in many ways, similar to the process that the Copyright Office described as being appropriate for this Panel to engage in when the Librarian rejected the Joint Motion.

246. Thus, Music's 4.5% benchmark is based on the 1983 CRT award of 4.5%, and the uninterrupted period of settlements at 4.5% for each of the years from 1984 to 1992. Music's use of the last settlement period to demonstrate changed circumstances is not unreasonable in view of the long history of settlements after Music's last litigation and the absence of complete and comparable data for 1983.

247. The March 20, 2003 Order of the Copyright Office made it clear that "the usefulness of a particular benchmark is a factual matter" (emphasis added). Music Claimants demonstrated the relevance and probative value of the settlement. None of the other parties introduced any evidence to show that the 1991-92 settlement is not a reflection of the parties' assessment of the value of music, or of the parties' perception that music use in 1991-92 was

consistent with the level of music use in 1983. In the absence of such evidence, and given the circumstances described above, the inferences drawn by the Music Claimants concerning the 1991-92 settlement are entirely reasonable.

D. Music Claimants Demonstrated That Music Use Has Increased Since 1991-92 and Since 1983.

248. The evidence presented by the Music Claimants shows that music use on distant signals increased by 11% between 1991-92 and 1998-99.

249. The Music Claimants also demonstrated an increase in music use of 11% between 1983 and 1998-99 on the stations that were most widely carried in 1983 and 1991-92 (namely WTBS and WGN, which also paid the bulk of the royalties)).

250. In addition, ASCAP's unrebutted music use credit study, prepared for the 1989 CRT proceeding demonstrates that average use credits per hour of music use on distant signals increased by about 7%, and feature performances increased by 36-37%, from 1983 to 1989. There is no evidence to suggest that music use in general or feature uses of music on distant signals decreased from 1989 to 1998. To the contrary, the testimony, documents and video exhibits offered by Saltzman, Walden and Lyons confirms that feature uses of music also increased between 1991-1992 and 1998-1999.

251. Music Claimants' music use study was properly designed and implemented. The weights assigned by Music properly account for the greater economic significance of the stations that are more widely carried and generate most fees, and protect against smaller stations from skewing the survey results. Music Claimants properly included the top fee generating stations in both periods of their current music study in order to assure consideration of the most economically significant station. In considering the value of music in programs to cable operators, it is appropriate to determine whether it was carried distantly by one system or by one

thousand, and, to the extent possible, how much was paid by the cable operators to carry that signal.

252. The Music Claimants adjusted their calculations in the rebuttal phase of the proceedings to account for any plausible criticism on the basis of alleged overweighting of public television stations or inclusion of allegedly non-compensable substituted WGN programming. Even with such adjustments, the calculations demonstrate approximately the same statistically significant increases in music use between 1991-92 and 1998-99.

253. The evidence presented by the Music Claimants demonstrates an increase in music use between 1991-92 and 1998-99, and shows a high likelihood of such an increase between 1983 and 1998-99. In an open market, the Music Claimants would assert that these increases justify an increase in the user's music license fees. If no agreement was reached, the rate courts would consider increased music use in determining a reasonable fee. Capital Cities/ABC, Inc., 831 F. Supp. at 156.

E. Music Claimants Have Demonstrated Continued Entitlement to A Share Based on Carriage of Radio Signals

254. There is evidence that Music Claimants are entitled to a share of whatever amount is determined to be allocated to radio carried on distant signals by virtue of music on commercial radio stations. 1979 Decision, 47 Fed. Reg. at 9894; 1983 Decision, 51 Fed. Reg. at 12,800-01.

255. There is no record evidence that the amount of Music Claimants' award attributable to such radio carriage should be decreased.

F. Music Claimants Are Entitled to Equal Allocations of 5.0% from Each of the Three Funds

256. The CRT divided cable royalties into three separate funds based on the three separate rates for which royalties are made. 1983 Decision, 51 Fed. Reg. at 12,818. On appeal,

the CRT was found to have reasonably concluded that its distribution role would be facilitated by making separate allocations of the royalties collected at the three separate rates. Nat'l Ass'n of Broads. v. Copyright Royalty Tribunal, 809 F.2d 172, 178 (2d Cir. 1986). The practice of allocations made from three separate funds (with the fact that certain claimants are ineligible to receive royalties from certain funds) was followed by the only CARP to consider a Phase I cable distribution proceeding. 1990-1992 Decision, 61 Fed. Reg. at 55,669. No party to this proceeding has argued that this bedrock precedent be jettisoned. In the past, Music Claimants have always received the same share of the Basic, 3.75, and Syndex funds in all CRT awards and settlements.

257. As noted above, the last time the CRT determined Music's share, it found that Music "admits almost no possible precise formula to determine its marketplace value . . . ." There is nothing in the records that negates or, in any way, undermines the CRT's perceptive observation. In fact, the record in this proceeding confirms the validity of the CRT's analysis. There is, accordingly, no reason to depart from the well-established and binding precedent of awarding Music Claimants the same share of each of the three funds.

G. Dr. Schink's Analysis Is Not A Sound Basis for Determining Music Claimants' Share

258. Dr. Schink's testimony utilizes an untenable series of assumptions in an attempt to justify a massive reduction from the 4.5% allocation Music Claimants received between 1983 and 1992.

259. Dr. Schink's comparison of music fees to television broadcast rights and other program expenses is inconsistent with the approach and methodology used by the CRT in the 1978 Proceeding. Dr. Schink includes Network data in his calculations; the CRT did not, because Network programming is not compensable in cable distribution proceedings. In

addition, because Dr. Schink did not use comparable data, his program expense estimates are unreliable. Moreover, he did not weight the stations to reflect their contribution to the royalty pool.

260. Dr. Schink's estimates and calculations of the appropriate share for Music based on expenses of the cable networks are, if anything, even less reliable and less appropriate as a market analogy to the value of music in retransmissions of local broadcasts. In 1978 and 1979 (and 1980), the CRT did not examine the ratio of music license fees to other expenses of the cable networks.

261. Dr. Schink based his cable network estimates and conclusions on a combination of incomplete evidence of interim and final music license fees paid by some cable networks to either ASCAP or BMI. Dr. Schink was also unable to identify what expenses were included in his calculation of cable network program expenses. There is no evidence to properly support Dr. Schink's methodology and estimates.

262. There is no basis to calculate Music Claimants' share for the year 1999 based on Dr. Schink's testimony.

263. Dr. Schink's conclusions must also be rejected because precedent in these proceedings establish that the analogy of other music license fees is imperfect, especially where, as here, the market rates were paid on an interim basis and are subject to retroactive adjustment. 1980 Decision, 48 Fed. Reg. at 9558, 9567. The CRT in 1983 did not consider the market music rates and their relationship to other expenses at all. 1983 Decision, 51 Fed. Reg. at 12,812.

264. The CRT found, in 1980, that Music's share cannot be determined by a mechanistic application of any particular formula. 1980 Decision, 48 Fed. Reg. at 9566. That finding is in line with the opinion of Judge Connor in the ASCAP Rate Court:

> [T]he Court must admit that it remains incapable of quantifying the value of music to any particular television program. Not do we believe that the rate-setting function requires us to venture any such assessment. Surveying the fluctuations in the amount of music used by a network over time provides an adequate proxy by which to gauge whether the significance of music to network programming has changed relative to prior years; assuming all other factors remain constant, the direction in which a network's music use has headed should chart the course for the music license fees owed. . . ."

Capital Cities/ABC, Inc., 831 F. Supp. at 156.

265. Music's 4.5% benchmark established in the most recent proceeding in which Music litigated was not based on any comparisons of expenses in the television (Network, local station or cable network) industry. 1983 Decision, 51 Fed. Reg. at 12,812.

266. Music demonstrated that in the open market, music license fees are not based on a formula taking into consideration broadcast rights expenses or total program expenses. The relevant factors are prior-agreed or court-determined rates, the user's revenues, music use and any changed circumstances. See, e.g., Capital Cities/ABC, Inc., 831 F. Supp. at 144, 161; Adjustment of the Rates for Noncommercial Education Broadcasting Compulsory License, 96-6 CARP NCBRA, Panel Report at 28 (PTV Demo 5).

267. Unlike other studies and methodologies presented in this proceeding, Dr. Schink's methodology is not "tried and true" and has not been subject to repeated cross-examination, discovery, rebuttal, and consequent refinement. It should, therefore, be utilized, if at all, only with great caution. Given the difficulties described above, Dr. Schink's testimony should not be the basis for a drastic reduction in Music Claimants' share from a level established in a CRT proceeding, adopted with a minor reduction in two subsequent CRT proceedings, reinstituted in a fourth CRT proceeding, and agreed to in settlements covering a nine year period of time.

268. Music, and the evidence of other claimants, has demonstrated that the amounts spent by the broadcast stations and cable networks are not a proper basis upon which to determine the relative value to the cable systems of the copyrighted works owned by the claimant groups. The market for rights to retransmit programs on distant signals by cable operators is very different from the program expenses incurred by broadcast stations or for cable networks, the two benchmarks offered by Dr. Schink, for at least the following reasons.

a. Advertising cannot be inserted into retransmitted distant signals by cable operators and, therefore, cable operators do not have the opportunity to earn advertising revenue that is available to broadcasters and cable networks.

b. Cable operators pay under a rate schedule that includes minimum fees even when no signals are taken.

c. Cable operators must decide to carry, or not to carry, an entire signal while broadcasters and cable networks can make program-by-program choices reflecting their perceived value. Cable operators must clear rights in music in a number of different channels in each market.

d. Local news, which is very important to local broadcasters, is of little value in distant markets.

269. Music's share should be based on the totality of evidence submitted by Music as to the value of music to programming, the creative contribution of composers and songwriters, the fact that Music's share remained stable for a decade, the fact that music use has increased on the programs that are retransmitted, and the amount of cable royalties available for distribution (the revenues factor). An award to Music of 5% is fair and reasonable.

V. PROPOSED ALLOCATION

270. Based on the credible record evidence, Music Claimants should be awarded shares of 5% of the remaining Basic, 3.75, and Syndex funds[29] after the subtraction of NPR's share.

[29] In response to this Panel's Order of August 13, 2003, Music Claimants submit that their share should be an identical 5.0% of each of the three Funds consistent with Music Claimants' position that Music's share should not be differentially allocated among the other claimants and consistent with the prior awards and settlements which Music submits should serve as a benchmark for the calculation of its award.

Respectfully submitted,

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I, Jeffrey J. Lopez, hereby certify that on this 20th day of August, 2003, copies of the foregoing "Proposed Findings of Fact and Conclusions of Law of Music Claimants" were served per the agreement of the parties by Hand Delivery on the following:

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